81-293

No.

Office-Supreme Court, U.S.
FILED
AUG 12 1981
STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

LARRY VAN EMMERIK, and all others similarly situated,

Appellant,

v.

WILLIAM J. JANKLOW, Governor of South Dakota; MARK V. MEIERHENRY, Attorney General of South Dakota; DAVID VOLK, Treasurer of South Dakota; and R. VAN JOHNSON, Secretary of Revenue of South Dakota,

Appellees,

and

BLACK HILLS POWER AND LIGHT COMPANY; NORTHERN STATES POWER COMPANY; MONTANA-DAKOTA UTILITIES COMPANY; OTTER TAIL POWER COMPANY: NORTHWESTERN PUBLIC SERVICE COMPANY; and IOWA PUBLIC SERVICE COMPANY,

Appellees,

On Appeal From The Supreme Court of South Dakota

JURISDICTIONAL STATEMENT

GEORGE A. BANGS
BANGS, McCULLEN, BUTLER, FOYE & SIMMONS
818 St. Joseph Street
Rapid City, South Dakota 57709
(605) 343-1040
Counsel of Record

GALE E. FISHER
208 Court House Plaza
Sioux Falls, South Dakota 57102
(605) 332-0300
Attorneys for Appellant

QUESTIONS PRESENTED

1. Where utility consumers have been overcharged for 11½ years by overstatement of sales tax, and have brought actions to recover such overcharges, may the legislature retroactively raise the rate of sales tax and thereby immunize the utility companies from liability for such overcharges?

2. Where the Revenue Department has wrongfully and unlawfully collected sales tax 1% in excess of that plainly authorized by the legislature and a general statute provides for the recovery thereof from the State, subject to a three year limitation, may the legislature, by retroactively raising the rate of tax, destroy such right to refund?

3. Where the South Dakota Supreme Court has, by final and unappealable judgment, determined that sales taxes in excess of the lawful rate have been collected, and has remanded the matter for mathematical determination of the amount of refund due, may the legislature retroactively raise the rate of tax and thereby nullify the refund judgment?

TABLE OF CONTENTS

		Page
OPINIONS BELOW		1
GROUNDS OF JURISDICTION		1
CONSTITUTIONAL PROVISIONS		2
THE STATUTE INVOLVED		2
STATEMENT OF THE CASE		8
I.	Brief History of South Dakota Sales Tax Legislation	8
II.	Excess Tax Collections	9
III.	Related Litigation	
	A. Van Emmerik I	9
	B. The Tax Refund Case	10
	C. Van Emmerik II	10
IV.	The Case at Bar	11
	A. Senate Bill 40	11
	B. Alternative Writ of Prohibition	12
	C. Decision of the South Dakota Supreme Court	12
	D. How the Federal Question Was Presented	12

Page

THE QUESTIONS ARE SUBSTANTIAL

1. Where utility consumers have been overcharged for 11½ years by overstatement of sales tax, and have brought actions to recover such overcharges, may the legislature retroactively raise the rate of sales tax and thereby immunize the utility companies for such overcharges? 15

2. Where the Revenue Department has wrongfully and unlawfully collected sales tax 1% in excess of that plainly authorized by the legislature and a general statute provides for recovery thereof from the state, subject to a three year limitation, may the legislature, by retroactively raising the rate of tax, destroy such right to refund 18

3. Where the South Dakota Supreme Court has, by final and unappealable judgment, determined that sales tax in excess of the lawful rate has been collected, and has remanded the matter for mathematical determination of the amount of refund due, may the legislature retroactively raise the rate of tax and thereby nullify the refund judgment? 25

CONCLUSION 30

TABLE OF AUTHORITIES

Page

Cases:

Board of Commissioners v. Forbes Pioneer Boat Lines, 80 Fla. 252, 86 S. 199 (Fla. 1920) 21, 22

City of Mt. Vernon v. Althen, 72 S.D. 454, 36 N.W. 2d 410 (S.D. 1940) 27

Commonwealth v. Budd Company, 374 Penn. 159, 108 A.2d 563 (Penn. 1954) 25

Comptroller v. the Glenn L. Martin Co., 140 A.2d 288 (Mary. 1958) 22, 25

Coombes v. Getz, 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866 17

Ettor v. Tacoma, 228 U.S. 148, 57 L.Ed. 773, 33 S.Ct. 428 17

Forbes Pioneer Boat Lines v. Board of Commissioners, 258 U.S. 338, 42 S. Ct. 325, 66 L.Ed. 647 (1922) 18, 21

Gunn v. Barry, 82 U.S. 539, 21 L.Ed. 212 (1873) 17

Hodges v. Snyder, 45 S.D. 149, 186 N.W. 867 (S.D. 1922), 261 U.S. 600, 43 S.Ct. 435, 67 L.Ed. 819 .....19, 20, 28

In the Matter of Sales Tax Refund Application of Black Hills Power and Light, et al., 298 N.W.2d 799 (S.D. 1980) 1, 10, 25

Lacidem Realty Corp. v. Graves, 288 N.Y. 354, 43 N.E.2d 440 (N.Y. 1942) 25

Mower v. Fletcher, 114 U.S. 127, 5 S.Ct. 799, 29 L.Ed. 117 26

McCullough v. Virginia, 172 U.S. 102, 18 S.Ct. 154, 43 L.Ed. 382 (1898) 17

People v. Graves, 280 N.Y. 405, 21 N.E.2d 371 (N.Y. 1939) 25

United States v. Heinszen, 206 U.S. 370, 27 S.Ct. 742, 51 L.Ed. 1098 (1907) 18, 19, 21, 22
Van Emmerik v. State (Van Emmerik I), 298 N.W.2d 804, (S.D. 1980) 1, 9, 10
Washington National Arena v. Treasurer, 410 A.2d 1060 (Mary. 1980) 22, 29
Welch v. Henry, 271 N.W. 68 (Wisc. 1937), 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 ..... 23, 24
Western Building Co. v. J. C. Penney Co., 60 S.D. 630, 245 N.W. 909 (S.D. 1932) 27

Statutes and Constitutional Provisions:

United States Constitution, Article I, §10 ..... 2, 13, 16, 17, 28
United States Constitution, Amendment XIV 2, 13, 28
South Dakota Constitution, Article II 28
South Dakota Constitution, Article VI, §12 13
South Dakota Constitution, Article VI, §13 13
South Dakota Compiled Laws, §10-45-2 ..... 4, 8
South Dakota Compiled Laws, §10-45-3 8
South Dakota Compiled Laws, §10-45-4 8
South Dakota Compiled Laws, §10-45-5 8
South Dakota Compiled Laws, §10-45-6 ..... 4, 5, 7, 8, 9, 17
South Dakota Compiled Laws, §10-45-7 8

South Dakota Compiled Laws,
§10-45-8 ..... 4, 6, 7, 8
South Dakota Compiled Laws,
§10-45-53 ..... 10, 17, 18, 25, 26
South Dakota Session Laws 1974,
Chapter 97 9
South Dakota Session Laws 1969,
Chapter 267 8
South Dakota Session Laws 1980,
Chapter 325, §22 6
28 U.S.C. §1257(2) 1
Miscellaneous:
Senate Bill 40 .....1, 2, 11, 12, 13 16, 17, 19, 28

OPINIONS BELOW

The opinion of the Supreme Court of South Dakota, which appears in the Appendix (A-1-A-42), is not yet reported.

The opinion of the South Dakota Supreme Court *In the Matter of Sales Tax Refund Applications of Black Hills Power and Light, et al.*, is reported at 298 N.W.2d 799 (S.D. 1980).

The opinion of the South Dakota Supreme Court in *Van Emmerik v. State* (hereinafter referred to as *Van Emmerik I)* is reported at 298 N.W.2d 804 (S.D. 1980).

GROUNDS OF JURISDICTION

Petitioner, Van Emmerik, for himself and all others similarly situated, sought a writ of prohibition from the Supreme Court of South Dakota to prohibit the Governor, Attorney General, State Treasurer and Secretary of Revenue of South Dakota from carrying out the retroactive provisions of Senate Bill 40, an Act of the South Dakota legislature.

The Supreme Court of South Dakota issued a temporary Writ of Prohibition and accepted original jurisdiction of the proceedings. Thereafter, on April 15, 1981, the Supreme Court of South Dakota entered its Order Quashing Alternative Writ of Prohibition and Dismissing Proceeding (Appendix B-1 - B-4). Order Denying Rehearing was entered on May 19, 1981 (Appendix C-1-C-2.) Notice of Appeal was filed in the South Dakota Supreme Court on June 10, 1981 (Appendix D-1 - D-4).

This appeal is being docketed in this Court within ninety days from the denial of rehearing below. Jurisdiction is conferred on this Court by 28 U.S.C. §1257(2).

CONSTITUTIONAL PROVISIONS

Article I, Section 10, United States Constitution:

> "No state shall . . . pass any . . . law impairing the obligation of contracts . . ."

Fourteenth Amendment, United States Constitution:

> " . . . nor shall any state deprive any person of life, liberty or property without due process of law."

THE STATUTE INVOLVED

Senate Bill 40 enacted by the South Dakota Legislature and signed into law by the Governor on January 30, 1981 reads as follows:

> "An Act to provide for a retroactive and prospective sales tax increase on utility services, amusements and athletic events; to allow credit for taxes already paid, to validate and ratify the collection of prior taxes and to declare an emergency.

I certify that the attached Act originated in the SENATE as SENATE BILL No. *40*.	Received at this Executive Office this 30th day of January, 1981 at 4:42 P.M.
/s/ Joyce L. Hazeltine	By /s/ Loralee Yocom
Secretary of the Senate	for the Governor

/s/ Lowell Hanson II
President of the Senate

Attest:

/s/ Joyce L. Hazeltine
Secretary of the Senate

The attached Act is hereby approved this 30th day of January, 1981.

/s/ William Janklow
Governor

/s/ Walter D. Miller
Speaker of the House

Attest:

/s/ Paul Inman
Chief Clerk

STATE OF SOUTH DAKOTA

ss.

Office of the
Secretary of State
Filed January 30, 1981 at 5:00 P.M.

/s/ Alice Kundert
Secretary of State

Senate Bill No. 40
File No. _____
Chapter No. _____

AN ACT

ENTITLED, An Act to provide for a retroactive and prospective sales tax increase on utility services, amusements and athletic events; to allow credit for taxes already paid, to validate and ratify the collection of prior taxes, and to declare an emergency.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF SOUTH DAKOTA:

Section 1. The Legislature finds that:

(1) At all times since July 1, 1969, and until May 1, 1980, §§ 10-45-6 and 10-45-8 as heretofore existing in the statutes of this State were intended by the Legislature to apply the same rates of tax as applied by §10-45-2;

(2) Retailers of electric, gas, water services, amusement, entertainment and other services in this State have in good faith collected and remitted to the State tax on such services at the rate prescribed in § 10-45-2;

(3) The State, in good faith, has received all sums paid pursuant to §§ 10-45-6 and 10-45-8, which sums were deposited in the state treasury and thereafter, from time to time, appropriated by the Legislature for the general support of government, and subsequently expended for such purpose;

(4) The refund of such taxes heretofore collected and paid to the State would seriously impair the fiscal integrity of the State;

(5) The consumers of electric, gas, water, amusement, entertainment and other services in this State who have paid retailers the rates imposed by § 10-45-2 are also taxpayers and citizens of the State;

(6) Such citizens will be denied basic services of government in the event of such refund, or will be required to pay additional taxes to replace the revenues lost to the state treasury and therefore, ultimately derive little benefit from any such refund;

(7) The necessary cost of administration would be substantial and would deplete any refunds, therefore the ultimate benefit to any taxpayer would be minimal;

(8) The retroactive application of this Act will not result in the collection of any additional taxes from the citizens of this State.

Section 2. That § 10-45-6 be amended to read as follows;

10-45-6. There is hereby imposed a tax of four percent upon the gross receipts from sales, furnishings, or service of gas, electricity, and water, including the gross receipts from such sales by any municipal corporation furnishing gas, and electricity, to the public in its proprietary capacity, when sold at retail in the state of South Dakota to consumers or users.

Section 3. That § 10-45-6 be amended to read as follows;

10-45-6. There is hereby imposed a tax of five percent upon the gross receipts from sales, furnishing, or service of gas, electricity, and water, including the gross receipts from such sales by any municipal corporation furnishing gas, and electricity, to the public in its proprietary capacity, except as otherwise provided in this chapter, when sold at retail in the state of South Dakota to consumers or users.

Section 4. That § 10-45-8 be amended to read as follows:

10-45-8. There is hereby imposed a tax of four percent upon the gross receipts from all sales of tickets or admissions to places of amusement and athletic events, except as otherwise provided in this chapter, and upon the gross receipts derived from the operation of pinball machines and other mechanical devices for amusement for which a charge is made for the operation thereof, mechanical phonographs, shooting galleries, bowling alleys, pool and billiard tables. In case the operator is the lessee of the devices referred to in the last preceding sentence, such lessee shall be deemed the owner thereof for the purposes of this section. The operator of the machines above described shall keep a record of the gross income derived from each of said machines above described and shall report the same to the department of revenue at the same time other sales tax reports are due upon forms prescribed by the secretary of revenue.

Section 5. Section 2 of this Act is effective as follows:

(1) Retroactively, for the time period between July 1, 1969, through May 1, 1980; and

(2) Prospectively, to commence after the tax increase levied by chapter 325, of the 1980 Session Laws, is removed pursuant to section 22 of that Act.

Section 6. Section 3 of this Act is effective as follows:

(1) Retroactively, for the time period commencing on May 1, 1980, until the effective date of this Act; and

(2) Prospectively, from the effective date of this Act until the tax increase levied by chapter 325, of the 1980 Session Laws, is removed pursuant to section 22 of that Act.

Section 7. Section 4 of this Act is retroactive to July 1, 1969.

Section 8. The retroactive tax rates created by this Act are effective only to the extent that such taxes have heretofore been collected by the retailer, and any taxes heretofore paid pursuant to §§ 10-45-6 and 10-45-8 shall be credited to the tax imposed by sections 2, 3 and 4 of this Act.

Section 9. The collection of taxes at the rates established by this Act which was effectuated prior to the passage of this Act are hereby validated and ratified.

Section 10. If any provisions of this Act or any severable provision of a section of this Act, or the application or such provision to any person or circumstance, shall be held invalid the remainder of the Act or section thereof and the application of such provision to persons and circumstances other than those as to which it is held invalid shall not be affected.

Section 11. Whereas, this Act is necessary for the support of the state government and its existing public institutions, an emergency is hereby declared to exist, and this Act shall be in full force and effect from and after its passage and approval."

STATEMENT OF THE CASE

I. BRIEF HISTORY OF SOUTH DAKOTA SALES TAX LEGISLATION.

In 1935 South Dakota embarked upon a policy of reliance upon a sales tax for a major portion of the State's revenue. A tax of 2% was then levied upon the privilege of engaging in business as a retailer. A "like rate of tax" was imposed upon gross receipts from sales, furnishing or service of gas, electricity, water and communication services, and a "like rate of tax" was levied upon gross receipts from sales of tickets of admission.

This tax expanded to encompass other categories and rates were changed from time to time. When the statutes of South Dakota were compiled in SDCL 1967 the several categories and rates were divided into sections and stated as follows:

10-45-2	Sale of tangible personal property - 3%
10-45-3	Sale of farm machinery - 2%
10-45-4	Receipts from professional and business services -same rate as tangible personal property
10-45-5	Receipts from specific enumerated services -same rate as tangible personal property
10-45-6	Utility and communication service - 3%
10-45-7	Room rentals to transient guests - 3%
10-45-8	Amusements and athletic events - 3%

By Chapter 267, South Dakota Laws 1969, §10-45-2 was amended by increasing the rate from 3% to 4%. This, of course, carried with it §§10-45-4 and 10-45-5 which levied a tax "at the same rate". § 10-45-6 relating to utilities and communication services was not amended.

By Chapter 97, South Dakota Laws 1974, § 10-45-6 was specifically amended in order to delete communication services therefrom. Communication services were then separately treated in what became § 10-45-6.1 with a tax imposed upon the consumer rather than the retailer in order that the Federal excise tax might not encompass the amount of the State sales tax. By such legislation, however, 10-45-6 was restated and re-enacted in the following words:

> "10-45-6. There is hereby imposed a tax of three percent upon the gross receipts from sales, furnishing, or service of gas, electricity, and water, including the gross receipts from such sales by any municipal corporation furnishing gas, and electricity, to the public in its proprietary capacity, except as otherwise provided in this chapter, when sold at retail in the state of South Dakota to consumers or users."

II. *EXCESS TAX COLLECTIONS*

Commencing with the effective date of Chapter 267, South Dakota Laws 1969, the Revenue Department of South Dakota demanded and received from all utility companies a sales tax amounting to 4% of the gross receipts, rather than 3% as specified in the statute.

III. *RELATED LITIGATION*

A. *VAN EMMERIK I*

About March 1, 1979 the named plaintiff, acting for a class consisting of consumers who had paid "sales tax overcharges" during the next preceding three years, brought suit against (a) the Secretary of Revenue and other tax officials, and (b) utility companies as a class who had collected sales tax overcharges from their customers. The class was certified and two utility companies were served as

representatives of the defendant class. Consistently, however, they refused to recognize their representative capacity and did not plead and defend, other than as individual defendants.

After deciding the tax refund case, hereinafter more fully described, the trial judge entered a dismissal of this case based upon the legal theory that the lawful rate of sales tax was 4% rather than 3%. Upon appeal to the South Dakota Supreme Court the case was remanded with instructions to dismiss as against the State defendants, but to proceed as against the utility companies upon the basis that 3% was the lawful rate of sales tax. *(Van Emmerik v. State,* 298 N.W.2d 804 (S.D. 1980)).

B. *THE TAX REFUND CASE*

Meanwhile, back at the ranch, the six investor owned utilities filed appropriate refund claims with the Secretary of Revenue, which claims were denied. They appealed to the Circuit Court of the Sixth Circuit, which likewise denied the claims, and the matter was then appealed to the South Dakota Supreme Court, which, on November 19, 1980, reversed and remanded "for a determination of a credit or refund pursuant to the provisions of SDCL 10-45-53". *(In the Matter of Sales Tax Refund Applications of Black Hills Power & Light,* 298 N.W.2d 799 (S.D. 1980)).

By letter filed with the South Dakota Public Utilities Commission, the six investor owned utilities promised to pass on any refunds to the consumers who had actually paid the tax.

C. *VAN EMMERIK II*

After learning of the refund claim and feeling somewhat aggrieved by the lack of notice thereof, the named plaintiff

commenced a new and separate action on February 14, 1980, on behalf of a class consisting of all consumers who had paid sales tax overcharges since July 1, 1969. In this action every utility company known to the plaintiff was individually named and served with process. By this time the underlying question, i.e., the legal rate of sales tax, was on its way towards determination by the South Dakota Supreme Court and this lawsuit was held in abeyance pending that determination.

IV. *THE CASE AT BAR*

A. *SENATE BILL 40*

On January 30, 1981, the 56th Legislative Assembly of South Dakota passed and the Governor signed into law Senate Bill 40. (Whenever in this brief we refer to Senate Bill 40 we are referring to the retroactive provisions thereof.) By the retroactive provisions of Sections 5 and 6 (which are severable under Section 10) the Act seeks:

> (a) to increase the sales tax on gross receipts from utility bills from 3% to 4% for the period from July 1, 1969 through May 1, 1980, and
>
> (b) to increase such tax rate from 3% to 5% for the period from May 1, 1980 to the effective date of Senate Bill 40.

Obviously, if these retroactive provisions are sustained the results will be:

> (a) to nullify the final judgment of the South Dakota Supreme Court adjudging a tax refund to be due and to abrogate all rights of the plaintiff class to the proceeds of that judgment;

(b) to wipe out all claims of the plaintiff class against all of the utility companies in South Dakota which are asserted in *Van Emmerik II*; and

(c) to bar all claims for refund against the State of South Dakota by other utility companies.

B. *ALTERNATIVE WRIT OF PROHIBITION*

Upon application of Van Emmerik, the Supreme Court of South Dakota, on February 3, 1981, issued an Alternative Writ of Prohibition restraining the implementation of Senate Bill 40 pending the further order of the Court. The Court also joined the six investor owned utility companies as additional parties and established an expedited briefing schedule.

C. *DECISION OF THE SOUTH DAKOTA SUPREME COURT.*

On April 15, 1981, the South Dakota Supreme Court handed down its decision dissolving the Writ of Prohibition and overruling all constitutional challenges to Senate Bill 40. That opinion, not yet published, is reproduced in the Appendix. Petition for Rehearing was submitted on April 27, 1981, and denied on May 19, 1981.

D. *HOW THE FEDERAL QUESTION WAS PRESENTED*

Petitioner initiated original proceedings before the Supreme Court of South Dakota in order to challenge on constitutional grounds the retroactive provisions of Senate Bill 40. Issue VI presented to that Court by Petitioner was:

DOES S.B. 40 IMPAIR THE OBLIGATIONS OF CONTRACT CONTRARY TO ARTICLE VI, SECTION 12 OF THE SOUTH DAKOTA CONSTITUTION AND ARTICLE I, SECTION 10 OF THE U. S. CONSTITUTION?

Issue VII was:

DOES S.B. 40 TAKE PROPERTY WITHOUT JUST COMPENSATION AND WITHOUT DUE PROCESS CONTRARY TO ARTICLE VI, SECTION 13 OF THE SOUTH DAKOTA CONSTITUTION AND THE FOURTEENTH AMENDMENT TO THE U. S. CONSTITUTION?

By Petition for Rehearing filed on April 27, 1981, and denied on May 19, 1981, Petitioner posed to the South Dakota Supreme Court the following three Federal questions:

1. Where utility consumers have been overcharged for 11½ years by overstatement of sales tax, and have brought actions to recover such overcharges, may the legislature retroactively raise the rate of sales tax and thereby immunize the utility companies from liability for such overcharges?

2. Where the Revenue Department has wrongfully and unlawfully collected sales tax 1% in excess of that plainly authorized by the legislature and a general statute provides for recovery thereof from the State, subject to a three year limitation, may the legislature, by retroactively raising the rate of tax, destroy such right to refund?

3. Where the South Dakota Supreme Court has, by final and unappealable judgment, determined that sales taxes in

excess of the lawful rate have been collected, and has remanded the matter for mathematical determination of the amount of refund due, may the legislature retroactively raise the rate of tax and thereby nullify the refund judgment?

By its Order Denying Rehearing (App. C-1, 2) the South Dakota Supreme Court answered such queries in the affirmative.

THE QUESTIONS ARE SUBSTANTIAL

1. WHERE UTILITY CONSUMERS HAVE BEEN OVERCHARGED FOR 11½ YEARS BY OVERSTATEMENT OF SALES TAX, AND HAVE BROUGHT ACTIONS TO RECOVER SUCH OVERCHARGES, MAY THE LEGISLATURE RETROACTIVELY RAISE THE RATE OF SALES TAX AND THEREBY IMMUNIZE THE UTILITY COMPANIES FOR SUCH OVERCHARGES?

We have earnestly sought to distill from the opinion of the South Dakota Supreme Court a constitutional principle and we have arrived at the following which we feel is a fair statement of the holding:

> WHENEVER THE TAX COLLECTOR HAS UNLAWFULLY DEMANDED AND COLLECTED TAXES IN EXCESS OF THE RATE ESTABLISHED BY THE STATUTES OF THIS STATE, THE LEGISLATURE HAS POWER TO RATIFY THE UNLAWFUL EXACTIONS BY RETROACTIVELY RAISING THE RATE OF TAX TO CONFORM TO THE AMOUNT ACTUALLY COLLECTED.

This is the constitutional rule of law which the decision establishes and it is the rule under which the people of South Dakota must live if that opinion stands.

Although by all odds the most horrendous, this is neither the first mistake ever made by the South Dakota Department of Revenue nor the last, and when that all-too-human department errs again, the executive branch will descend upon the legislature and again demand absolution for its sins lest the public treasury be compelled to restore monies

illegally exacted from the taxpayers. We submit South Dakota will be the only one of the fifty states wherein the legislature has unbounded power to confer such absolution under the name of a "curative statute".

Senate Bill 40 has three avowed objectives, each of which we submit is constitutionally impermissible under the Federal Constitution. These objectives are:

1. To protect utility companies who have for 11½ years overcharged their customers by 1% under the guise of recouping an amount of sales tax not legally due to the State, from claims of such customers.

2. To protect the State against claims extending back to mid-1976 for wrongful collection of excess sales taxes from the utility companies.

3. To overturn and nullify a judgment, final and unappealable, rendered by the South Dakota Supreme Court in November, 1980 adjudging and declaring that the six investor owned utilities shall recover from the State the excess taxes collected since mid-1976.

The State of South Dakota, through its legislature, has thus abused and misused its taxing power in a retroactive fashion for the avowed purpose of conferring immunity upon utility companies which have for 11½ years overcharged their customers under the guise of recouping a sales tax in excess of the amount actually due to the taxing authority. The contract between the utility consumers and the utility corporations requires that the customer should pay the established charge plus lawful sales tax. For the legislature to alter that contract retroactively is an impermissible impairment of the obligations of contract contrary to the express provisions of Article 1, Section 10, of the United States Constitution. As stated by dissenting Justice Dunn:

> "We would be attempting to validate a tax for the sole purpose of obviating any liability of the utilities to Van Emmerik for the years previous to 1976. This liability does not affect the State, due to SDCL 10-45-53, and has the obvious effect of granting a special immunity and privilege to the utilities." (App. A-20.)

As stated by dissenting Justice Henderson:

> "The retroactive tax imposed by Senate Bill 40 prior to June 1, 1976 (the limitation date beyond which no claim for refund against the State could be levied) was for the sole purpose of relieving the utility companies of a legal obligation to make restitution to affected electrical consumers for excess charges illegally exacted from them. Obviously, this is not a public purpose and is therefore unconstitutional." (App. A-23, 24.)

Dissenting Justice Henderson continues:

> "Due to the utilities 11½ year failure to comply with SDCL 10-45-6, the contract between respondent utilities and petitioner was breached; thus petitioner had a right to recover the excess charges. By retroactively applying Senate Bill 40 to canvas the entire duration of the utilities' breach, the majority opinion impairs an existing contractual obligation, which is blatantly inconsistent with the letter and spirit of our state's constitutional law." (App. A-24.)

State action impairing the obligations of contract have been stricken down by this Court in such cases as *Gunn v. Barry*, 82 U.S.539, 21 L.Ed. 212 (1873); *McCullough v. Virginia*, 172 U.S. 102, 18 S.Ct. 134, 43 L.Ed. 382 (1898); *Coombes v. Getz*, 285 U.S. 434, 52 S.Ct. 435, 76 L.Ed. 866, and *Ettor v. Tacoma*, 288 U.S. 148, 57 L.Ed. 773, 33 S.Ct. 428.

2. **WHERE THE REVENUE DEPARTMENT HAS WRONGFULLY AND UNLAWFULLY COLLECTED SALES TAX 1% IN EXCESS OF THAT PLAINLY AUTHORIZED BY THE LEGISLATURE AND A GENERAL STATUTE PROVIDES FOR RECOVERY THEREOF FROM THE STATE, SUBJECT TO A THREE YEAR LIMITATION, MAY THE LEGISLATURE, BY RETROACTIVELY RAISING THE RATE OF TAX, DESTROY SUCH RIGHT TO REFUND?**

SDCL 10-45-53 provides for refund of sales taxes erroneously paid provided that claim therefor shall be filed within three years after the erroneous payment is made. While the investor owned utilities (IOUs) had made such claim and processed it, the rights arising from the refund judgment will be treated under the next question. Other utility companies, such as municipals and co-ops, had not reduced their claims to judgment, yet if the statute is upheld they will be deprived of such refund rights and their customers, who have actually paid the unlawful tax, will be without recourse.

The cases on retroactive tax laws appear at first glance to be irreconcilable. One line of cases stemming from *United States v. Heinszen*, 206 U.S. 370, 27 S.Ct. 742, 51 L.Ed. 1098 (1907), upholds the validity of curative statutes which have an incidental effect of ratifying otherwise unlawful tax exactions. The other line of cases, stemming from *Forbes Pioneer Boat Lines v. Board of Commissioners*, 258, U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647 (1922), strikes down retroactive tax measures as constituting a taking of property without just compensation and without due process. After more thorough study we have evolved the following dichotomy which we think may be of assistance to the Court:

1. If an unlawful imposition of tax is made by a person, board or commission, to whom the legislature could lawfully have delegated the authority to make such impositions, then the legislature may thereafter retroactively ratify the unlawful imposition *provided that it does not attempt to disturb rights fixed by final judgment.*

2. If an unlawful imposition of tax is made by violation of statute by a person, board or commission to whom the legislature could not have lawfully delegated authority to fix the amount of tax, then the legislature may not retroactively validate that action which it could not have authorized. [1]

VALID CURATIVE STATUTES

In the *Heinszen* case the President, as Commander-in-Chief, imposed a tariff on goods coming into the Philippine Islands. The treaty of April, 1899, which ended the Spanish-American War, likewise terminated the authority of the President to impose such tariffs, but they were continued in effect and collected. In 1902 Congress continued the tariffs by law. Illegal tariffs were collected between 1899 and 1902 because there was a hiatus in the authority to collect such duties. In 1906 Congress enacted a statute to legalize and ratify such collections. The *Heinszen* case holds that Congress, which had the power to authorize the President or his commissioner to fix and collect duties, likewise had power to ratify, retroactively, the collections which were effected from 1899 to 1902. This is the theory which supports *Hodges v. Snyder,* 45 S.D. 149, 186 N.W. 867 (S.D. 1922), wherein the South Dakota Supreme Court ap-

---

1 The opinion below recognizes that the Department of Revenue "*enacted a sales tax* one percent higher than that authorized by statute" (App. A-11), and that S.B. 40 seeks to legalize that action.

proved curative legislation to cure the illegal organization of a school district and to ratify its actions, including the levy and collection of school taxes which were duly expended for school purposes. *Hodges v. Snyder* went to this Court and is reported under that name under 261 U.S. 600, 43 S.Ct. 435, 67 L.Ed. 819, and was affirmed. However, certain language of the opinion is of more than passing interest. For example:

> "It is true that, as they contend, the private rights of parties which have been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation."

Thus, as we have pointed out in our discussion of separation of powers and impairment of contract, the judgment of the South Dakota Supreme Court decreeing a tax refund must stand regardless.

The Court goes on to state:

> "This rule, however, as held in the Wheeling and B Bridge case, does not apply to a suit brought for the enforcement of a public right, which, even after it has been established by the judgment of the court, may be annulled by subsequent legislation, and should not be thereafter enforced; although, insofar as a private right has been incidentally established by such judgment, as for special damages to the plaintiff, or for his costs, it may not be thus taken away."

The public right referred to was the injuction against continued activity of an illegally formed school board. That right terminated upon passage of the curative legislation and properly so. Then the Court goes on:

> " . . . and so a judgment for the restitution of taxes collected under the ostensible authority of a general statute will be reversed when, after the rendition of

> such judgment, a statute has been passed legalizing and ratifying such taxation." (Citing an offspring of the *Heinszen* case.)

This statement is too broad. It does not and cannot encompass a case such as the one at bar where the general statute fixed the lawful rate of tax and this rate was increased by administrative authorities not empowered to fix the rate of tax.

INVALID RETROACTIVE TAXATION

Transferring our attention now to category two. This stems from the opinion of Justice Holmes for a unanimous court in *Forbes Pioneer Boat Lines v. Board of Commissioners*, 258 U.S. 338, 66 L.Ed. 647 (1922). In the *Forbes* case the State of Florida had collected canal tolls not authorized by law. Suit was brought for restitution against the State and the legislature undertook to wipe out the recovery retroactively. The Florida Court followed the reasoning of *Heinszen* and declared the statute valid. *Board of Commissioners v. Forbes Pioneer Boat Lines*, 80 Fla. 252, 86 S. 199 (Fla. 1920). However, upon review in this Court, this decision was reversed by a unanimous court speaking through Justice Holmes. *Forbes Pioneer Boat Lines v. Board of Commissioners, supra.* What was the point of distinction which differentiated that case from *Heinszen?* We submit that the significant feature was that the Florida legislature had the duty to fix the canal toll and could not delegate that duty to the controlling board. Thus it could not ratify the illegal action of the board in collecting tolls not imposed by the legislature. The language of Justice Holmes fits the factual situation which faces this Court. He stated:

> "Stripped of conciliatory phrases the question is whether a state legislature can take away from a private party a right to recover money that is due when the act is passed . . . . Defendant owed the plaintiff a definite sum of money that it had extorted

> from the plaintiff without right. It is hard to find any ground for saying that the promise of the law that the public force shall be at the plaintiff's disposal is less absolute than it is when the claim is for goods sold. Yet no one would say that a claim for goods sold could be abolished without compensation. It would seem from the first decision of the court below that the transaction was not one for which payment naturally could have been expected. To say that the legislature simply was establishing the situation as both parties knew from the beginning it ought to be would be putting something of a gloss upon the facts. We assume that the plaintiff went through the canal relying upon its legal rights, and it is not to be deprived of them because the legislature forgot."
> (258 U.S. 338 at 648-649.)

The most thorough exposition we have found of the distinction between *Heinszen* and *Forbes* is set forth by the Maryland Court of Appeals in *Washington National Arena v. Treasurer*, 410 A.2d 1060 (Mary. 1980). We commend that decision to the careful attention of the Court.

The Maryland legislature established a maximum rate of recordation tax of $1.10. The tax collectors collected $1.65. Thus the express legislative policy was a tax rate of $1.10, but this legislative policy was violated by administrative officials who collected $1.65. An attempt by the legislature to change the rate from $1.10 to $1.65 retroactively and thereby validate the action of the tax collectors was held to be unconstitutional.

Another Maryland case of more than passing interest because it concerns retroactivity of sales and use tax provisions, is *Comptroller v. the Glenn L. Martin Co.*, 140 A.2d 288 (Mary. 1958). In that case certain transactions of the

Martin Company were found to be exempt from sales and use tax because the property purchased and used was destined for sale to the United States government. When Martin sued for refund the legislature made retroactive changes designed to wipe out the refund claim. After lengthy discussion the Maryland court found such retroactivity to be a denial of due process.

Falling outside the dichotomy we have suggested, are the many cases involving brief periods of retroactivity with respect to income and gift taxes. The most extreme period of retroactivity disclosed by our research is a period of less than two years involved in *Welch v. Henry*, 271 N.W. 68 (Wisc. 1937), affirmed in *Welch v. Henry*, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87. The 1935 session of the Wisconsin legislature undertook to repeal an exemption of domestic corporation dividends from state income tax. It made its law retroactive to 1933 (the year of the next preceding session of its biennial legislature). The taxpayers, having already submitted their returns and paid their taxes in 1934, challenged the retroactive aspect of the legislation. The Wisconsin court upheld the statute by a four to three vote, remarking in doing so:

> "That the legislature may go back at least to the most recent year for which they have returns furnishing data upon which to estimate the total rate of the tax to the state. *While the present tax may approach or reach the limit of permissible retroactivity, it does not exceed it.*" (Emphasis supplied.) (271 N.W. at 72.)

This Court affirmed over the dissent of three justices. In so doing the majority opinion made the following comments which we deem significant:

> " . . . And we think that the 'recent transactions' to which this Court has declared a tax law may be retroactively applied, Cooper v. United States, 280 U.S. 409, 411, 74 L.Ed. 516, 517, 50 S.Ct. 164, must be taken to include the receipt of income during the year of the legislative session preceding that of its enactment . . . Thus the legislature in 1935, at the first opportunity after the tax year in which the income was received, made its revision of the tax laws applicable to 1933 income . . . . While the Supreme Court of Wisconsin thought that the present tax might 'approach or reach the limit of permissible retroactivity', we cannot say that it exceeds it."

We think the income tax cases are readily distinguishable. We likewise feel and urge that the legislature could not constitutionally delegate to the Department of Revenue the authority to fix a rate of sales tax in excess of that plainly expressed in the statute. That being true, the legislature cannot retroactively ratify that which it could not have authorized.

Among the state courts of last resort there is no unanimity as to how much retroactivity is "too" much. As we have observed, the Wisconsin court in *Welch v. Henry* considered that retroactivity back to the last preceding session of its legislature was stretching the matter to its constitutional limits. *Welch v. Henry*, 271 N.W. 68 (Wisc. 1937).

Dissenting Justice Dunn observes:

> "No court, prior to the majority herein, has even approached the time frame of 10 years. It appears that a much more reasonable and shorter time has been the limitation reached to this point. The majority would therefore be exceeding precedent by almost five times the maximum time approved to date." (App. A-19.)

The Pennsylvania Court apparently adopts that as a general rule and will allow retroactivity to that extent. *Commonwealth v. Budd Company*, 374 Penn. 159, 108 A.2d 563 (Penn. 1954).

Maryland considers six years too much for retroactivity. *Comptroller v. Glenn L. Martin Company*, 216 Mary. 235, 140 A.2d 288 (Mary. 1958).

New York starts with the proposition that sixteen years is too much *(People v. Graves*, 280 N.Y. 405, 21 N.E.2d 371 (N.Y. 1939), and then continues with the holding that four years is too much, but that it is permissible in a tax law to give retroactive operation back to the beginning of the year preceding the year of enactment. *Lacidem Realty Corp. v. Graves*, 288 N.Y. 354, 43 N.E. 2d 440 (N.Y. 1942).

3. WHERE THE SOUTH DAKOTA SUPREME COURT HAS, BY FINAL AND UNAPPEALABLE JUDGMENT, DETERMINED THAT SALES TAX IN EXCESS OF THE LAWFUL RATE HAS BEEN COLLECTED, AND HAS REMANDED THE MATTER FOR MATHEMATICAL DETERMINATION OF THE AMOUNT OF REFUND DUE, MAY THE LEGISLATURE RETROACTIVELY RAISE THE RATE OF TAX AND THEREBY NULLIFY THE REFUND JUDGMENT?

By its decision of November 19, 1980 *In the Matter of the Appeal of the Sales Tax Refund Applications of Black Hills Power and Light Co.*, 298 N.W.2d 799 (S.D. 1980), the South Dakota Supreme Court determined, with finality, that the applicable rate of sales tax on utility services was 3% as stated in the statute, rather than 4% as imposed by the Department of Revenue. That matter was thereupon settled with absolute finality and was not subject to further

question in any court. Thereupon that Court reversed the trial court and remanded "for a determination of a credit or refund pursuant to the provisions of SDCL 10-45-53".

As noted by Justice Henderson's dissent (App. A-24, 25):

> "We held in those cases that there should be a determination of a credit or refund pursuant to the provisions of SDCL 10-45-53. According to that statute, the Commissioner of Revenue was to make that determination. It appeared that the Court had spoken, entered judgment, and a ministerial duty existed. However, the Commissioner of Revenue, himself an attorney general, did nothing to go forward with his judicially and statutorily determined duty. Therefore, the decisions of this Court were frustrated. Our decisions became mired in a lower court, to there linger and die. This does not appear to me to be in the best public interest."

It has been well settled law that a judgment is final when it determines the legal rights of the parties and leaves nothing to be done by lower court or administrative body except the ministerial act of executing the judgment. The principle was stated by this Court almost a century ago in the case of *Mower v. Fletcher,* 114 U.S. 127, 5 S. Ct. 799, 29 L.Ed. 117. The Court stated:

> "The litigation is ended, and the rights of the parties on the merits have been fully determined. Nothing remains to be done but to require the inferior court to perform the ministerial act of entering the judgments in that court which have been ordered, into execution. Nothing is left to the judicial discretion of the court below. The cases relied on in support of the motions to dismiss were all judgments or decrees of reversal, with leave for further proceedings in the inferior court. Such judgments are

> not final, because something yet remains to be done to complete the litigation."

The South Dakota Supreme Court has recognized that principle and has stated it as follows:

> "A judgment is none the less final although future orders of the court may be necessary to carry it into effect. 49 C.J.S., Judgments, Sec. 11. The judgment disposed of the particular matter before the court and does not hold the case open for further adjudication on the merits. If a judgment so disposes of the merits of the particular matter before the court, the fact that further proceedings may be necessary to make it effective does not interfere with its finality." *(City of Mt. Vernon v. Althen,* 72 S.D. 454, 36 N.W. 2d 410 (S.D. 1940).)

See also Western Building Co. v. J. C. Penney Co., 60 S.D. 630, 245 N.W. 909 (S.D. 1932).

The opinion below, then seizes upon the following sentence from the Van Emmerik appeal:

> "Evidence that the 1% excess tax was actually shifted to the customers is, of course, an essential element of proof." (App. A-13.)

Of course the investor owned utility companies have never denied that the excess tax was actually shifted to the customers. If, in fact, some customers of REAs or municipals were not charged the excess tax, they are by definition excluded from the litigation. The plaintiff class is limited to those customers who have actually paid sales tax overcharges.

The decision of November 19, 1980 is a final and

unreviewable determination that a refund of sales tax is due to the investor owned utilities. Computation of the amount thereof is a mere ministerial act involving mathematics, not judicial discretion. The IOUs have no economic interest in enforcing their judgment because they are commited, both contractually and by law, to pass on any benefits thereof to the plaintiff class. To the contrary, the IOUs desire Senate Bill 40 to be upheld because it is designed to immunize them against millions of dollars in customer overcharge claims.

The members of the plaintiff class have a fully vested right to receive their prorata share of the tax refund ordered to be paid by the final judgment of the South Dakota Supreme Court. A legislative nullification of such vested rights not only flies in the face of the separation of powers (Article II, South Dakota Constitution), it also impinges upon the contract clause (Article I, Section 10, United States Constitution), and deprives class members of equal protection of the laws (Amendment XIV, United States Constitution).

Even in *Hodges v. Snyder*, 261 U.S. 600, 43 S.Ct. 435, 67 L.Ed. 819 (1923), where retroactive legislation was permitted to validate taxes imposed by a defectively organized school board, this Court carefully noted that the final judgment for costs was unimpaired. (67 L.Ed. at 822.) The Court noted:

> " . . . the private rights of parties which had been vested by the judgment of a court cannot be taken away by subsequent legislation, but must be thereafter enforced by the court regardless of such legislation."

Our research has disclosed only one case which is identical in principle to the case at bar. In that case:

1. The legislature fixed by law a rate of tax;

2. The tax collecting authority demanded and collected a rate of tax in excess of that established by the legislature;

3. Claims for refunds were filed for the excess; and

4. The legislature then attempted, by retroactive statute, to raise the tax rate in order to legalize the unlawful collections and wipe out the refund claims.

The Court of Appeals of Maryland struck down the retroactive law as being in violation of both Maryland and United States Constitutions. *(Washington National Arena v. Treasurer*, 410 A.2d 1060 (Mary. 1980). In so doing the Maryland court had the following to say which is precisely applicable to the case here under consideration:

> "Furthermore, as in Forbes and Martin, the fact that the Legislature in Ch. 129 couched the language in 'curative' terms, and recited (contrary to the language of the prior statute) that its intent had always been the same, does not convert a retroactive policy change into a permissible ratification statute. The presence of 'curative' language, or a recital that the Legislature in the past really intended what is now being enacted into law, cannot render a statute immune from constitutional challenge on retroactivity grounds. If it did, any retroactive legislation could be shielded from a successful constitutional attack merely by the insertion of such language.
>
> To give Ch. 129 of the Acts of 1976 the retrospective application urged by Prince George's County would be to hold that a Legislature, after it set one rate of tax upon certain transactions, could then, as long as

eight years after the taxable transactions were fully completed under the old rate, reach back and substantially increase that tax on those same transactions. We are aware of no case going so far." (410 A.2d at 1069).

This Court denied certiorari in that case (cert. den. 10/6/80, 49 LW 3246; 66 L.Ed.2d 40).

CONCLUSION

For these reasons, this Court should note probable jurisdiction of this appeal.

Respectfully submitted,

GEORGE A. BANGS
BANGS, McCULLEN, BUTLER, FOYE & SIMMONS
818 St. Joseph Street; P.O. Box 2670
Rapid City, South Dakota 57709
(606) 343-1040

GALE E. FISHER
208 Courthouse Plaza
Sioux Falls, South Dakota 57102
(605) 332-0300
Attorneys for Appellant

APPENDIX

	Page
South Dakota Supreme Court Opinion — April 15, 1981	A-1 - 42
Order Quashing Alternative Writ of Prohibition and Dismissing Proceeding — April 15, 1981	B-1 - 4
Order Denying Rehearing — May 19, 1981	C-1 - 2
Notice of Appeal to the Supreme Court of the United States — June 9, 1981	D-1 - 4

APPENDIX
IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, ex. rel.
LARRY VAN EMMERICK and all
others similarly situated,

Petitioner,

v.

WILLIAM J. JANKLOW, Governor of
South Dakota; MARK V. MEIERHENRY,
Attorney General of South Dakota;
DAVID VOLK, Treasurer of South Dakota;
and R. VAN JOHNSON, Secretary of Revenue
of South Dakota,

Respondents,

and

BLACK HILLS POWER AND LIGHT COMPANY;
NORTHERN STATES POWER COMPANY;
MONTANA-DAKOTA UTILITIES COMPANY;
OTTER TAIL POWER COMPANY; NORTHWESTERN
PUBLIC SERVICE COMPANY; and IOWA PUBLIC
SERVICE COMPANY,

Parties Respondent Added
by Supreme Court.

ORIGINAL PROCEEDING

GEORGE A. BANGS of
BANGS, McCULLEN, BUTLER, FOYE & SIMMONS
Rapid City, South Dakota
and
GALE E. FISHER
Sioux Falls, South Dakota

Attorneys for
Petitioner
Van Emmerick

MARK V. MEIERHENRY
Attorney General
Pierre, South Dakota

On the brief:
John P. Dewell
Assistant Attorney General
Pierre, South Dakota

Attorneys for
Respondent State
Officials.

BRENT WILBUR of
MAY, ADAMS, GERDES & THOMPSON
Pierre, South Dakota

Attorneys for
Respondent
Investor-Owned
Utilities.

ALAN F. GLOVER of
DENHOLM & GLOVER
Brookings, South Dakota

On the brief:
Vincent J. Protsch
Madison, South Dakota

Attorneys for Amicus Curiae South Dakota Rural Electric Association.

ROBERT B. FRIEBERG of
FRIEBERG, FRIEBERG & PETERSON
Beresford, South Dakota

Attorneys for Amicus Curiae South Dakota Municipal Electric Association.

J. W. GRIEVES of
GRIEVES & RAHN
Winner, South Dakota

Attorneys for Amicus Curiae Rosebud Electric Cooperative, Inc. and Cherry-Todd Electric Cooperative, Inc.

Argued February 19, 1981
Opinion filed April 15, 1981

FOSHEIM, Justice

This is an original proceeding in which petitioner seeks writs of prohibition and mandamus. We deny the writs sought and quash the alternative writ of prohibition previously issued.

The present case has its origins in litigation commenced by petitioner in 1979. Petitioner originally instituted a class action seeking a one percent refund of sales taxes from the

State of South Dakota and from all retailers engaged in the sale, furnishing or service of gas, electricity, or water since January 1, 1976, which petitioner claimed were collected in excess of the rate imposed by SDCL 10-45-6. The utility companies eventually moved to dismiss because they had commenced an administrative action in June of 1979, seeking a similar one percent sales tax refund. Thereafter, petitioner moved to consolidate his action with the appeal taken to circuit court by the investor-owned utilities in the related administrative action following the denial of their applications for sales tax refunds by the Secretary of Revenue. On February 20, 1980, the circuit court rendered judgment denying the relief sought in the investor-owned utilities cases. Subsequently, on April 1, 1980, the court entered an order dismissing petitioners complaint based upon its determination in the related case that the State had not collected a sales tax in excess of that imposed by statute.

Petitioner and the investor-owned utilities then took seperate appeals to this Court. In the appeal of the investor-owned utilities, we concluded that the sales tax rate imposed by SDCL 10-45-6 was three percent and that the State had, since 1969, collected a sales tax in excess of the amount imposed by statute. We accordingly reversed and remanded for determination of a credit or refund to be adjusted in favor of the utilities pursuant to the provisions of SDCL 10-45-53. *See* In the Matter of the Appeal of the Sales Tax Refund Applications of Black Hills Power and Light Co., 298 N.W.2d 799 (S.D. 1980). Petitioner's appeal was decided the same day. In that case, we held that, due to the doctrine of sovereign immunity, petitioner had no standing to seek a refund from the State either as a representative of his class or in his individual capacity. At the same time, we determined that petitioner was entitled to proceed against the utilities to seek relief derivative of any remedy adjusted in favor of the utilities in the related litigation. *See* Van Emmerik v. State, 298 N.W.2d 804 (S.D. 1980).

Following remand, and during the pendency of circuit court hearings in the two cases, the 1981 Legislature enacted Senate Bill 40, entitled "An Act to provide for a retroactive and prospective sales tax increase on utility services, amusements and athletic events; to allow credit for taxes already paid, to validate and ratify the collection of prior taxes, and to declare an emergency."

Section 1(1) of the act provides that "[a]t all times since July 1, 1969, and until May 1, 1980, Secs. 10-45-6 [dealing with the rate of tax imposed upon the gross receipts from sales of utilities] and 10-45-8 [dealing with the rate of tax imposed upon the gross receipts from sales related to amusements and athletic events] as heretofore existing in the statutes of this State were intended by the Legislature to apply the same rates of tax as applied by Sec. 10-45-2 [which imposed a tax of four percent upon gross receipts from sales of tangible personal property] . . ."

Section 2 of the act specifically amends SDCL 10-45-6 to provide a four percent rate of tax upon sales of utility services, and Section 5 makes Section 2 effective retroactively from May 1, 1980, to July 1, 1969, and prospectively to commence when a tax increase levied by 1980 S.D. Sess. L., ch. 325 is removed.[1]

Section 3 of Senate Bill 40 amends SDCL 10-45-6 to impose a five percent rate of tax upon utilities sales, and Section 6 renders Section 3 effective retroactively from "the effective date of this Act" to May 1, 1980, and prospectively

---

1. The 1980 Legislature raised certain sales, excise, and use taxes to fund the purchase of a state rail line. The Legislature directed that those 1980 tax increases be repealed as of July 1, 1981 or when the revenue raised thereby is sufficient to repay all obligations incurred by the South Dakota Railroad Authority. See 1980 S.D. Sess. L., ch. 325, Sec. 22.

from "the effective date of this Act" until the tax increase levied by the 1980 Legislature is removed.[2]

Section 8 of Senate Bill 40 protects retailers who may not have collected the full amount of the tax from their customers.[3] It provides that any tax previously paid under Secs. 10-45-6 and 10-45-8 shall be credited to the taxes imposed by Sections 2, 3 and 4 of Senate Bill 40.

Section 9 of the Act ratifies and validates the collection of taxes effectuated prior to passage of the act. Section 10 contains a severability clause and Section 11 declares an emergency to exist.

The Act was passed by the Legislture, and thereafter approved by the Governor on January 30, 1981, as an emergency act in full force and effect as of that date. On that same day, petitioner instituted this original proceeding, challenging the constitutionality of Senate Bill 40 and seeking writs of prohibition and mandamus to restrain the State from enforcing or attempting to implement Senate Bill 40 and to order payment of funds for excess sales taxes paid to the State. On February 3, 1981, we granted an alternative writ of prohibition ordering that the State desist and refrain from acting pursuant to Senate Bill 40 until further order of this Court.

---

2. Section 4 of the act amends SDCL 10-45-8 to raise the sales tax on sales related to amusements and athletic events to four percent, Section 7 makes Section 4 retroactive to July 1, 1969.

3. The retail sales taxes involved here are the liability of the retailer and not the ultimate consumer. *See* Van Emmerik v. State, supra. SDCL 10-45-27. While it is true that the tax is likely passed on to the consumer under SDCL 10-45-22, the retailer may, without so advertising, simply fail to add the tax.

Our analysis of petitioner's attack upon the validity of Senate Bill 40 begins with the recognition that statutes are presumed to have prospective application and may be construed as retroactive only when such intention plainly appears. SDCL 2-14-21; Johnson v. Kusel, 298 N.W.2d (S.D. 1980); In re Scott's Estate, 81 S.D. 231, 133 N.W.2d 1 (1965); Bahlkow v. Preston, 60 S.D. 151, 244 N.W. 93 (1932). There is no question here that Senate Bill 40 is expressly meant to be retroactive in much of its operation and must be construed as having such effect. We thus proceed directly to address the constitutional claims asserted by petitioner.

Petitioner recognizes that the mere fact of retroactivity is not sufficient in itself to establish the unconstitutionality of a statute. *See* Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938); Hodges v. Snyder, 261 U.S. 600, 43 S.Ct. 435, 67 L.Ed. 819 (1923); United States v. Heinszen & Co., 206 U.S. 370, 27 S.Ct. 742, 51 L.Ed. 1098 (1907); Alatalo v. Shaver, 45 S.D. 163, 186 N.W. 872 (1922). Petitioner contends, however, that Senate Bill 40 constitutes a taking of property without just compensation in violation of the Due Process Clauses of the Fifth and Fourteenth Amendments to the United States Constitution. It is argued that the act unlawfully deprives petitioner of his right to recover from the utilities (for sales tax overcharges passed on by the retailers) as a result of this Court's determinations, in Matter of Black Hills Power and Light, supra, and Van Emmerik v. State, supra, that the utilities were entitled to a credit or refund as a result of the sales tax overcharge at issue in that case, and that petitioner was entitled to seek relief from the utilities.

The validity of retroactive statutes, including those imposing retroactive taxes, has been challenged on many occasions in the courts of this nation. A review of the United States Supreme Court decisions involving retroactive legisla-

tion does not reveal inflexible rules of immutable patterns of due process analysis with respect to such legislation. Rather, it is clear that the constitutionality of a retroactive statute depends upon a broad variety of policy considerations couched within a due process framework.

Senate Bill 40 expressly purports to ratify the unauthorized collection by state officials of sales tax overcharges and to that extent, the law is a curative act. The two leading cases in this area are United States v. Heinszen & Co., supra, and Forbes Pioneer Boat Line v. Board of Commissioners, 258 U.S. 338, 42 S.Ct. 325, 66 L.Ed. 647 (1922). Petitioner relies heavily upon *Forbes*, which involved the collection of tolls at a canal operated by the State of Florida. The Board of Commissioners, the agency charged with responsibility for maintenance of the canal, collected tolls for passage from the plaintiff, which sued for a refund. On the same day that the Florida Supreme Court held that the Board was not empowered to collect the tolls, the Florida Legislature passed a statute providing that all previously collected tolls were legalized and validated. The Florida Supreme Court upheld the validity of the statute, but was reversed by the United States Supreme Court, which remarked:

> "To say that the Legislature simply was establishing the situation as both parties knew from the beginning it ought to be, would be putting something of a gloss upon the facts. We must assume that the plaintiff went through the canal relying upon its legal rights and it is not to be deprived of them because the Legislature forgot." (258 U.S. at 350, 42 S.Ct. at 326, 66 L.Ed. at 649.)

United States v. Heinszen & Co., supra, involved the right of the Philippine government to retain import and export duties, collected without authority, pursuant to an act of Congress that subsequently confirmed the collection. In

1898, after the Philippine Islands came under United States military control, a tariff went into effect pursuant to a presidential order. In 1889, the Spanish-American War was ended by treaty and collections continued under the same tariff. In 1902, an Act of Congress continued the original tariff in force. The Supreme Court subsequently held that the President, as Commander-in-Chief, had authority to impose the tariff until the treaty of peace was ratified, but after ratification, the authority had to come from Congress. Thus, between 1898 and the 1899 treaty ratification, the tariff was properly collected, just as it was following the 1902 Congressional action. However, between 1899 and 1902, there existed no authority for the collection. Congress accordingly enacted a statute in 1906 that purported to legalize and ratify the prior invalid collections.

The validity of the 1906 legislation was then attacked, and the United States Court of Claims refused to give effect to the statute. The Supreme Court reversed, stating that Congress, as well as the legislature of any state, may

> 'cure irregularities, and confirm proceedings which without the confirmation would be void, because unauthorized, provided such confirmation does not interfere with intervening rights.' (206 U.S. at 384, 27 S.Ct. at 746, 51 L.Ed. at 1103, quoting Mattingly v. District of Columbia, 97 U.S. (7 Otto) 687,690, 24 L.Ed. 1098, 1099 (1878).)

A superficial examination of the similarities between *Forbes* and *Heinszen* suggests some measure of irreconcilability in the results reached in the two decisions. In both cases, governmental officers charged with administering a program illegally collected certain fees in the belief that they were so authorized. In both, there were subsequent judicial decisions holding that the collections were unauthorized and that the payors were entitled to refunds.

Finally, in both cases, as a result of the litigation, retroactive legislation followed, purporting to ratify the prior unauthorized collections.

Petitioner, relying upon Washington National Arena Ltd. Partnership v. Treasurer, 287 Md. 38, 410 A.2d 1060 (1980), cert. denied, ____ U.S. ____, 101 S. Ct. 106-07, 66 L. Ed.2d 40 (1980), argues that the significant area of difference between *Forbes* and *Heinszen* lies in the existence of a controlling statute or expression of legislative policy contrary to the unauthorized actions of the governmental officials. That distinction, however, requires qualification, for in neither *Forbes* nor *Heinszen* was there any legislative enactment that bestowed upon the government officials the authority to collect the taxes in question. In *Forbes*, there had never existed *any* authority for the levy of tolls by the Florida Board of Commissioners. *See* Forbes Pioneer Boat Line v. Board of Commissioners, 77 Fla. 742, 82 So. 346 (1919). In other words, it could not be said that the Florida Legislature 'simply was establishing the situation as both parties knew it ought to be,' and it was thus impermissible for the Florida Legislature to ratify the imposition of a tax upon an event that was completely tax-free at the time of its occurrence. In *Heinszen*, on the other hand, the illegal tariff collection followed a period of authorized collection and was thus effected with at least some color of authority. The collection did not contravene a clear expression of policy that such type of tax was not to be imposed.

Forbes does not represent a departure from *Heinszen*, as is clear from the Court's approving citation of *Heinszen* for the proposition that the governing body can "ratify the collection of a tax that had been made without authority of law." *Forbes*, supra at 339, S.Ct. at 325, 66 L. Ed. at 648. Neither, in our opinion, does *Forbes* militate against a finding that Senate Bill 40 is constitutionally valid. It has been the legislative policy of this state since 1935 that the gross

receipts from sales of utility services should be subject to the imposition of sales taxes. *See* Matter of Black Hills Power & Light, supra. Thus, when the South Dakota Department of Revenue enacted a sales tax one percent higher than that authorized by statute (which action the Legislature purported to ratify by Senate Bill 40), it did so with some measure of ostensible authority. As stated in *Heinszen:*

> "That where an agent, without precedent authority, has exercised in the name of principal a power which the principal had the capacity to bestow, the principal may ratify and affirm the unauthorized act, and thus retroactively give it validity when rights of third persons have not intervened, is so elementary as to need but statement." (206 U.S. at 382, 27 S.Ct. at 745, 51 L. Ed. at 1102.)

Unlike *Forbes,* the present case involves an increase in the rate of an authorized tax category rather than the imposition of a tax upon a transaction that was not subject to any tax when consummated.

As noted earlier, no precise guidelines exist that state with certainty when a particular retroactive tax law can be upheld. In each case, "it is necessary to consider the nature of the tax and the circumstances in which it is laid before it can be said that its retroactive application is so harsh and oppressive as to transgress the constitutional limitation." Welch v. Henry, supra, at 147, 59 S. Ct. at 126, 83 L.Ed. at 93. Petitioner's contention that Senate Bill 40 is unduly harsh and oppressive essentially stems from the fact, that, prior to the law's enactment, decisions had been rendered by this Court that established certain rights with regard to the unauthorized collection of sales taxes (in the seminal Matter of Black Hills Power and Light and Van Emmerik v. State cases). Petitioner claims that Senate Bill 40 has thus impermissibly stripped him of an absolute, vested right to

recover for the sales tax overcharges that the act attempts to ratify. We disagree.

Even if it is assumed that petitioner's right to recover was in some sense vested, that right is nevertheless subject to the equities existing against it. United States v. Heinszen & Co., supra, at 386-87, 27 S. Ct. at 747, 51 L. Ed. at 1104. It is apparent here that petitioner's asserted right is not based on any substantial equity. The unauthorized tax had been mistakenly collected without interruption since 1969 and petitioner presumably shared in whatever public benefits the tax funded. Where an asserted vested right that is not linked to any substantial equity arises from the mistake of officers purporting to administer the law in the name of the State, the Legislature is not prevented from curing the defect in administration simply because the effect may be to destroy claims that would otherwise exist. Graham & Foster v. Goodcell, 282 U.S. 409, 51 S. Ct. 186, 75 L.Ed. 415 (1931). This principle explains the decisions validating statutes depriving persons of rights established by unexpected interpretations given to the statutes by the courts. *See, e.g.*, Seese v. Bethlehem Steel Co., 168 F.2d 58, 64 (4th Cir. 1948) (sustaining an act that destroyed an estimated five billion dollars in claims resulting from the Supreme Court's interpretation of federal legislation in another case); *see also* Hochman, C., The Supreme Court and the Constitutionality of Retroactive Legislation, 73 Harv. L. Rev. 692, 720-22 (1960). When the sales taxes were improperly exacted in the instant case, the Legislature undoubtedly possessed the power to authorize their imposition in the manner in which they were enforced and hence, from the very moment of their collection, a right in the Legislature to ratify the transactions was engendered. United States v. Heinszen & Co., supra, Petitioner (having shared in the benefits funded by the tax) effectively seeks a windfall in claiming that a vested right has arisen here since, had the official action in question had the effect it was intended to and could have had, no such right would have arisen.

The fact that rights modified by a retroactive statute have been asserted in litigation prior to the passage of the statute is not without significance, Western Union Telegraph Co. v. Louisville & Nashville Ry., 258 U.S. 13, 42 S.Ct. 258, 66 L. Ed. 437 (1922) (dictum), and it is plain that the Legislature cannot deprive a person of money actually received under a judgment antedating the legislation. Maryland v. Baltimore & Ohio Ry., 44 U.S. (3 How.) 534, 11 L. Ed. 714 (1845) (dictum). The litigation in the cases that gave birth to the present action is currently pending at the circuit court level pursuant to this Court's directions. The existence of pending litigation, however, is not controlling. *See* Hodges v. Snyder, supra; *Cf.* Chase Securities Corp. v. Donaldson, 325 U.S. 304, 65 S. Ct. 1137, 89 L.Ed. 1628 (1945). In Van Emmerik v. State, supra, at 807, we stated that "[e]vidence that the one percent excess tax was actually shifted to the customer is, of course, an essential element of proof." Petitioner does not represent here that such a showing has, in fact, been made, nor does he assert that there is a final, unreviewable determination concerning his rights flowing from the seminal litigation.[4] *Cf.* Chase Securities Corp. v. Donaldson, supra. Neither has petitioner demonstrated any substantial change of position in reliance upon our decisions in the related litigation.

A related consideration involves the extent to which petitioner changed his position in reliance upon SDCL 10-45-6 as it existed prior to the passage of Senate Bill 40. An important element involved in many cases involving retroactive taxation is the ability reasonably to foresee, at the time of the transaction in dispute, that a tax would be imposed, and the probability that any conduct would have been altered to avoid it. Welch v. Henry, supra; Milliken v. United States, 283 U.S. 15, 51 S. Ct. 324, 75 L.Ed. 809

4. Petitioner conceded in oral argument that no final, enforceable judgment in his favor exists.

(1931). This factor, however, typically bears relevance where an altogether new, affirmative tax is imposed upon a prior transaction that, had the tax been foreseen, might not have been consummated in order to avoid the liability created by the tax. The tax at issue in the present case could not have been avoided through an altered course of conduct in the same manner that income taxes or estate and gift taxes might be avoided through alternative methods of financial and estate planning.[5] *Cf.* Welch v. Henry, supra, and cases discussed therein. For this reason, petitioner's further claim that Senate Bill 40 is invalid due to its eleven and one-half year period of retroactivity also lacks merit. The temporal reasonableness of the retroactivity is relevant in a due process context insofar as it pertains to the element of foreseeablity which would have allowed a party to a previously untaxed transaction to alter his conduct to avoid imposition of a retroactive tax. The obvious reason for this concern is rooted in the principle that a person should be able to plan his conduct with reasonable certainty of the legal consequences. *See* Hochman, C., supra. As noted above, that principle is not threatened here.

Petitioner also contends that Senate Bill 40 violates Art. I, Sec. 10 of the United States Constitution and Art. VI, Sec. 12 of the South Dakota Constitution because it impairs the utilities consumers' contractual right to be charged by the utilities retailers at the established rate plus lawful sales tax. Initially, it must be noted that the Contract Clause of the fedeal constitution is not a specific, particularized, absolute, or unqualified prohibition to be read with the literal exactness of a mathematical formula. Rather, it is general in nature, affording a broad outline and requiring construction with a view toward the circumstances surrounding

5. It is hence fair to say that Senate Bill 40, in a practical sense, operates to effectuate the intentions of the affected parties as they existed when the tax was collected.

its invocation. Home Building & Loan Association v. Blaisdell, 290 U.S. 398, 54 S. Ct. 231, 78 L.Ed. 413 (1934). So also, in our opinion, must the comparable South Dakota provision be construed. We accordingly take cognizance that, although the contract clauses are phrased in absolute terms, in many cases the sanctity of contract must be balanced with other equally compelling factors. Moreover, it appears that the standard of reasonableness under the Contract Clause that should be utilized here coalesces in some degree with that utilized in determining the validity of retroactive legislation in a due process framework. Home Building & Loan Association v. Blaisdell, supra, at 447, 54 S.Ct. at 243, 78 L.Ed. at 434; *See* Hale, R., The Supreme Court and the Contract Clause, 57 Harv. L. Rev. 852 (1944); *See also* Veix v. Sixth Ward Building & Loan Association of Newark, 310 U.S. 32, 60 S.Ct. 792, 84 L.Ed. 1061 (1940). Much of what we have said herein with regard to the due process attack upon Senate Bill 40 thus applies with equal force to the challenge based upon the contract clause.

That the act might affect private rights in an effort to achieve a balance in the public interest does not render the act infirm. *See* Home Building & Loan Association v. Blaisdell, supra; *Cf.* FHA v. The Darlington, Inc., 358 U.S. 84 79 S.Ct. 141, 3 L.Ed.2d 132 (1958). To accept petitioner's argument would mean that while the State exercises sovereign immunity beyond the three-year limitation of SDCL 10-45-53 for erroneously imposing a sales tax, their conduit (utility) of that tax bears full exposure to the consumer (petitioner) for the overpayment passed on, even though the conduit not only retained nothing therefrom, but actually bore the administrative expense to collect and remit the tax. Conversely, the consumer who ostensibly shared in whatever benefit the tax funded could nevertheless effect a full refund from the conduit, but nothing directly from the sovereign that erroneously imposed and

received it. Insistence that retailers assume such a risk, whether pursuant to an express or an implied contractual obligation, would be patently unreasonable.[6]. It is fundamental to recognize that any contract between the utilities and their consumers concerning charges for sales tax is necessarily made with reference to the taxing power of the State. We emphasize that the prior illegal collection of the tax did not arise from an inherent want of power in the State, but simply from the failure to delegate to the Department of Revenue the authority essential to give immediate validity to its actions. *See* United States v. Heinszen & Co., supra.

We have reviewed petitioner's remaining arguments and find that they are either without merit or unnecessary to address in view of the conclusions we have reached. The alternative writ of prohibition is quashed[7] and the petition for permanent writs of prohibition and mandamus is dismissed.

WOLLMAN, Chief Justice, and MORGAN, Justice, concur.

---

6. We also reject petitioner's claim that Senate Bill 40 grants a special immunity in violation of Art. III, Sec. 23(9) of the South Dakota Constitution. The legislation does not grant an immunity to any single retailer but is applicable in its terms to a broad class of retailers. *Cf.* Bon Homme County v. Berndt, 15 S.D. 309, 88 N.W. 333 (1900).

7. The order quashing the alternative writ of prohibition shall be effective May 1, 1981. In so ruling, we have not overlooked SDCL 15-25-3, which provides that a party may file a petition for rehearing within twenty days after a decision has been rendered in an original proceeding in this Court. Any liability determined to exist in the event a rehearing is granted and our decision as expressed in this opinion is modified or reversed is an issue that can be resolved at such time as it arises.

DUNN, Justice, concurs in part and dissents in part.

HENDERSON, Justice, dissents.

DUNN, Justice (concurring in part, dissenting in part,)

I cannot entirely agree with the majority opinion as written.

From an analysis of the various Supreme Court decisions, I do however agree that the legislature can pass a retroactive increase in tax to cover refunds ordered paid in Matter of Sales Tax Refund Application, 298 N.W.2d 799 (S.D. 1980). As I understand these cases, the bottom line tests are whether: (1) a vested right has been taken away by the retroactive legislation; (2) the retroactive increase has a limitation in time which is reasonable and therefore not lacking in due process; (3) the validation of the tax would not have harsh and oppressive results; and (4) finally, that the validation would be in the public interest.

We previously held that Van Emmerik had no direct right to refunds of the tax from the State on the grounds of sovereign immunity, Van Emmerik v. State, 298 N.W.2d 804; however, he now claims a vested property right in refunds ordered paid by the State to the utilities. Matter of Sales Tax Refund Applications, supra. His claim is made on the basis of his derivative rights to receive any refund due him from any amounts paid by the States to the utilities. The State is only liable for refunds to the utilities for the years subsequent to 1976 under SDCL 10-45-53. Therefore, the question becomes whether Van Emmerik can complain that Senate Bill 40 would retroactively validate a tax back to 1976. In the first place, Van Emmerik has a very tenuous claim of a vested property right in a portion of these refunds to the utilities. There is certainly no final judgment in his favor. He must await the refund before he has any claim to

a portion of it. His claim simply has not ripened into a vested right and is presently pending in circuit court. As aptly stated in Hodges v. Snyder, 45 S.D. 149,157, 186 N.W. 867, 870 (1922), quoting from 2 Lewis' Sutherland, Statutory Construction 1237:

> "It is no objection to a curative act that it validates what has previously been declared invalid in a judicial proceeding. The judgment may furnish the occasion for the act. Of course, the Legislature cannot annul or set aside the judgment of a court, but it may remove a defect from which the judgment proceeded."

Therefore, as long as Van Emmerik's claim has not ripened into a vested right, the legislature could validate the tax that the judgment of the court found invalid in Matter of Sales Tax Refund Applications, supra. This retroactive tax would only go back three years which is a reasonable time and not violative of due process as indicated in Comptroller of Treasury v. Glenn L. Martin Co., 216 Md. 235, 140 A.2d 288 (1958).

In any event, the amount eventually due to Van Emmerik would be a trifling sum, which has been paid into the state treasury and used to provide services that Van Emmerik and all other citizens and utility consumers have enjoyed. Alatalo v. Shaver, 45 SD. 163, 186 N,W, 872 (1922), would therefore lend a further ground for sustaining a retroactive tax, for a reasonable time limitation, under a theory of a moral duty on the part of those who reaped the benefits should pay the cost thereof. If a refund is made from the state treasury, Van Emmerik and all other citizens and utility consumers would have to contribute to make the payment through some additional tax -- as a state must depend on its citizenry for funds. The end result, of sustaining Senate Bill 40 for a reasonable amount of time, would not be harsh or

oppressive to anyone and public interest and common sense cries out, in this case, for validating the retroactive increase in tax on any refund ordered paid by the State.

Therefore, I would hold that Senate Bill 40, insofar as it provides that all taxes which must be refunded to the utilities under SDCL 10-45-53, is a valid retroactive tax for the purpose of curing an oversight on the part of the legislature.

I would not, however, validate this tax back to the year 1969 for several reasons:

1. I am convinced that "there [must] exist a time period beyond which a statute may not constitutionally be given retroactive effect. . . ." *Martin*, supra, at 297. A time limitation is absolutely necessary, "otherwise a legislature could constitutionally impose a new or increased tax retroactively for a period of 25 or 50 years which would be so onerous or confiscatory and unjust as to bankrupt the individuals or corporations thus taxed." *Martin*, supra, at 298. There are ultimately some fixed time limitations which cannot be traversed.

No court, prior to the majority herein, has even approached the time frame of 10 years. It appears that a much more reasonable and shorter time has been the limitation reached to this point. The majority would therefore be exceeding precedent by almost five times the maximum time approved to date. It seeks to evade the limitation of the *Martin* decision on the grounds that the present action is a "ratification" case and that the legislature is free to ratify the imposition of an increased tax just as long as it cannot be classified as a *new* tax which has already been collected back ad infinitum. Are we really prepared to say that the State taxing authorities can collect an increased tax for 10,

20, 50 or 100 years without legislative sanction and then have it ratified by retroactive legislation?

If so, the Bureau of Finance would be free to collect whatever *increased* taxes it deems the State needs, and an executive-dominated legislature need only meet every 10, 20, 50 or 100 years to ratify the Bureau's actions by retroactive legislation, as they are only "ratifying an increase of an existing tax which has already been imposed and collected." This is not the democratic way and might well lead to another Boston Tea Party.

I would propose that the increased tax be limited to that period of time needed to shield the State, to-wit: the statutory limitation in SDCL 10-45-53 of three years. Such a result would merely strain the time limits of prior decisions; to go further would shatter the concept of a reasonable time limitation and may launch us down a path which I am not prepared to tread.

2. We would be attempting to validate a tax for the sole purpose of obviating any liability of the utilities to Van Emmerik for the years previous to 1976. This liability does not affect the State, due to SDCL 10-45-53, and has the obvious effect of granting a special immunity and privilege to the utilities. The test, in such a case, is set out in Matter of Certain Territorial Elec. Boundaries, Etc., 281 N.W.2d 65,70 (S.D. 1979) (emphasis added), where this court stated:

> "[E]xclusivity is not in itself prohibited by art. III, Sec. 23. The grant of special or exclusive privileges for private benefit *is* within the prohibition of the constitution. Grants of special or exclusive privileges, even those that are essentially monopolistic in character, are not, however, forbidden, *where the primary purpose of the grant is the*

promotion of the public interest and not the private benefit of the grantees."

That is exactly what is done by any retroactive statute which goes beyond the time needed to protect the State from liability, to-wit: the benefits and primary purposes enure to the private benefit of the utilities. Contrary to the majority holding, this legislation does not grant immunity to a "broad class" of retailers, but rather it grants immunity to a *single* class of retailers.

3. It does not involve the public policy considerations mentioned above, where the State would be refunding a tax and then proceeding to levy additional taxes to pay for the refund. The argument could be made that the same public interest applies to the taxes that the utilities have collected and paid into the state treasury prior to 1976, as they will be forced to obtain a rate hike in order to pay a refund. However, the public interest is not so apparent and urgent.

In the case of the State refunds, the state treasury would be depleted at a time when the State is grasping for sufficient funds to operate ordinary functions of state government; secondly, it will have to go through the cumbersome administrative process of determining the amount due to countless unknown (to it) utility users; and finally, the state would have to propose a new tax to the legislature to pay a refund at a time when tax is a dirty word.

The utilities on the other hand, having complete control of the list of utility users, can simply give credit for any refund due and immediately impose and collect a rate hike to pay for it with an accompanying petition to the Public Utilities Commission (PUC) for validation. This is no different than the situation that the utilities experience almost yearly when they impose and collect a rate hike of their own choosing, only to have it turned down or reduced by the

PUC and later must give credit or a refund to their customers. The utility consumer would hardly raise an eyebrow, as his utility bill generally reflects refunds on the last rate hike unilaterally imposed to more than cover the refunds ordered by the PUC in the last unsuccessful unilateral hike. Utility computers must already be set up for such an operation and it would be a "ho hum" problem for them, but it would be an *administrative* and *legislative nightmare* for the State.

4. This court should not validate a retroactive increase in tax going back 10 years and passed for the admitted purpose of shielding the utilities from possible liability prior to 1976, as Van Emmerik's only possible present claim to a vested property right stems from the refunds ordered to be paid by the State to the utilities. By further validation back to 1969, contrary to cited court precedent, we are only endangering a decision which is otherwise supportable under the facts and the controlling law.

I would hold that the retroactive increase in tax, covering the years for which the State is liable, is valid. I would hold that the retroactive increase in tax prior to that date where the State is absolved from liability under SDCL 10-45-53, is invalid.

HENDERSON, Justice (dissenting)

Senate Bill 40 offends Art. III, Sec. 23, subdivision 9 of the South Dakota Constitution, which prohibits the Legislature from enacting any provision or special law granting to corporation any special or exclusive privilege, immunity or franchise. The State of South Dakota is protected from any refund claims by the utility companies for any period of time prior to June 1, 1976. SDCL 10-45-53 explicitly so provides. Thus, permitting this tax law to be retroactively effective eleven and one-half years prior to its adoption grants the utility companies immunity from any

legal action by their customers for excess charges imposed upon them. This appears to be a clear violation of our State Constitution. The majority opinion is unprecedented in the annals of American Jurisprudence. *See* Comptroller of the Treasury v. Glenn L. Martin Company, 210 Md. 235, 140 A.2d 288 (1958). The majority opinion simply fails to recognize that the State of South Dakota and the aggrieved customers of electrical energy are in a far different legal posture.

Senate Bill 40 further offends Art. XI, Sec. 2 of the South Dakota Constitution, which provides, inter alia:

> Taxes shall be uniform on all property of the same class, and shall be levied and collected for public purposes only.

During oral argument before this Court, the Attorney General was questioned from the bench as to the reason for the additional eight and one-half years retroactivity. The Attorney General responded by stating that he thought what was fair, was fair; that is, the privately owned investor utilities should be shielded from liability in the same manner, and for the same time, as the State of South Dakota. The fair purport of his remarks clearly established that the reason for the deep reach back into history was to benefit these utility companies. It should be noted that he was the author of Senate Bill 40, and appeared before legislative committees in an effort to sell the bill, and was repeatedly seen on statewide television extolling the bill's merit. But the bottom line is this: The retroactive taxes imposed by Senate Bill 40 prior to June 1, 1976 (the limitation date beyond which no claim for refund against the state could be levied) was for the sole purpose of relieving the utility companies of a legal obligation to make restitution to affected electrical consumers for excess charges illegally exacted from them. Obviously, this is not a public purpose and is

therefore unconstitutional. White Eagle Oil & Refining Co. v. Gunderson, 48 S.D. 608, 205 N.W. 614 (1925).

Moreover, Senate Bill 40 appears unconstitutional when viewed in conjunction with Art. VI, Sec. 12 of the South Dakota Constitution, which provides:

> No ex post facto law, or law impairing the obligation of contracts or working any irrevocable grant of privilege, franchise or immunity shall be passed.

Senate Bill 40 also violates the United States Constitution, Art. I, Sec. 10, which expressly forbids any state to pass a law impairing the obligations of a contract. This Court has long recognized that legislative acts impairing contractual obligations are void. Skinner v. Holt, 9 S.D. 427, 69 N.W. 595 (1896). Affected consumers have a right to recover from a utility company any rate overcharges that were collected in violation of the law. Cass Clay, Inc. v. Northwestern Public Service Company, 63 F.R.D. 34 (D.S.D. 1974). In the instant case, petitioner contracted with the utilities to be charged at the established legal rate, plus sales tax. Due to the utilities' eleven and one-half year failure to comply with SDCL 10-45-6, the contract between respondent utilities and petitioner was breached; thus, petitioner had a right to recover the excess charges. By retroactively applying Senate Bill 40 to canvas the entire duration of the utilities' breach, the majority opinion impairs an existing contractual obligation, which is blatantly inconsistent with the letter and spirit of our state's constitutional law.

I am simply amazed at the turnabout of this Court from its decisions in Matter of the Appeal of the Sales Tax Refund Applications of Black Hills Power and Light Co., 298 N.W. 2d 799 (S.D. 1980) and Van Emmerik v. State, 298 N.W. 2d 804 (S.D. 1980). We held in those cases that there should be a determination of a credit or refund pursuant to the provisions of SDCL 10-45-53. According to that statute,

the Commissioner of Revenue was to make that determination. It appeared that the Court had spoken, entered judgment, and a ministerial duty existed. However, the Commissioner of Revenue, himself an attorney general, did nothing to go forward with his judicially and statutorily determined duty. Therefore, the decisions of this Court were frustrated. Our decisions became mired in a lower court, to there linger and die. This does not appear to me to be in the best public interest.

Our decisions were then placed into the political arena. Senate Bill 40, through the intense lobbying of the executive branch, became law. In essence, its purpose is to make the illegal legal. It must, of necessity, pass constitutional muster. It does not, to the extent and for the reasons that I have expressed above.

I find the language of the majority decision and its reasoning to be in conflict with the language expressed in *Black Hills Power*. In *Black Hills Power*, we were adamant that the Legislature had, since 1969, intentionally granted a special sales tax concession to certain utility services. Therefore, I view the eleven and one-half year retroactive application of an additional one cent tax as an imposition of a new tax and not the curing of a "defect". The preamble to Senate Bill 40 recites a legislative finding that at all times since July 1, 1969, the Legislature intended to apply the same rate of tax to utility bills as was applicable to retail sales. This is in direct contradiction to this Court's construction of the applicable statutes in November, 1980. I place small credence in the preamble. It is a cover-up. As was recently stated:

> We have pointed out that a statement by present members of a legislative body, as to what their predecessors intended in a statute enacted several years previously, is not entitled to much weight.

Washington National Arena Limited Partnership v. Treasurer, Prince George's County, 410 A.2d 1060, 1069, fn. 7 (Md. 1980). Now, the majority opinion states: "The unauthorized tax has been mistakenly collected without interruption since 1969[.]" Footnote 5 of the majority opinion appears to be in direct conflict with our expressions in the next to the last full paragraph of *Black Hills Power*.

Constant reference has been made by the Governor's office and the Attorney General's office as to Senate Bill 40 being in the best public interest. Furthermore, the executive branch has publicly urged that this case be treated with immediate attention or South Dakota would face financial ruin. Senate Bill 40 was flaming legislation. I am opposed to fire engine justice to put out the flame. It is good for it to cool. In other words, I feel compelled to thoughtfully reflect upon the constitutionality of this act.

I believe that when two branches of government fuse, such as the executive and legislative branches, that the third branch, namely the judicial branch, owes an awesome duty to protect the State Constitution and the great doctrines of the separation of powers. And that is in the public interest.

Tax collectors should collect only that amount of tax which they are authorized to collect. And that is in the public interest.

Lastly, it is in the public interest that the officials of this state act within the bounds of law. And not try to cover-up their wrong by urging a greater wrong. The state should not be above the law anymore than any ordinary citizen. The Department of Revenue of this state apparently had knowledge of its wrongful excessive tax collection in May of 1977 when it was called to its attention that taxes were being collected in excess of the state law. Its hands are not clean.

I agree with Justice Dunn that a validation of Senate Bill 40 must be in the public interest. Can it be in the public interest for the Department of Revenue to knowlingly flout a state law? I do not believe so. Arguments were heard in the Legislature and before this Court that the state needed the money and it could not afford to either refund the money to the people or give the people a credit. The state is essentially arguing that it has the right to keep the people's money so that government can operate. Fear of a ghost or phantom law to replace the lost revenue was used to pass Senate Bill 40. These are economic arguments, not legal arguments, and fly in the face of payment of a just obligation. The unlawful actions by the Department of Revenue in collecting sales tax at a rate greater than that imposed by the plain wording of the statute triggered this entire litigation.

At the risk of suffering the pundits of the intelligentsia, I am reminded of Luke 3:12-13, wherein John the Baptist stated upon being questioned by tax collectors: "Then came also publicans to be baptized, and said unto him, Master, what shall we do? And he said unto them, exact no more than that which is appointed you."

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

★ ★ ★ ★

STATE OF SOUTH DAKOTA ex rel. LARRY VAN EMMERIK and all others similarly situated, Petitioner, vs. WILLAIM J. JANKLOW, Governor of South Dakota; MARK V. MEIERHENRY, Attorney General of South Dakota; DAVID VOLK, Treasurer of South Dakota; and R. VAN JOHNSON, Secretary of Revenue of South Dakota, Respondents, and BLACK HILLS POWER AND LIGHT COMPANY; NORTHERN STATES POWER COMPANY; MONTANA-DAKOTA UTILITIES COMPANY; OTTER TAIL POWER COMPANY; NORTHWESTERN PUBLIC SERVICE COMPANY; and IOWA PUBLIC SERVICE COMPANY, Parties Respondent added by Supreme Court.	ORDER QUASHING ALTERNATIVE WRIT OF PROHIBITION AND DISMISSING PROCEEDING #13354

The above-entitled proceeding having been originally commenced in this Court by the filing of a verified petition for a writ of prohibition prohibiting The Honorable William J. Janklow, Governor of the State of South Dakota, The Honorable Mark V. Meierhenry, Attorney General of the State of South Dakota, The Honorable David Volk, Treasurer of the State of South Dakota, and The Honorable R. Van Johnson, Secretary of Revenue of the State of South Dakota, from acting under authority of certain legislation passed by the Legislature on January 30, 1981, involving the retroactive and prospective sales tax increase on utility services, and the Court having issued an alternative writ of prohibition on February 3, 1981, prohibiting above-named respondents from taking any action pursuant to such legislation until further order of the Court and commanding them and the parties respondent added by the Supreme Court to show cause before the Court why a writ of prohibition should not be issued permanently restraining respondent state officials from taking any action under said legislation and why a writ of mandamus should not issue commanding the utility companies to issue refunds in accordance with the decision of the Court issued in the action titled: "In the Matter of the Appeal of the Sales Tax Refund Applications of Black Hills Power and Light Co., Northern States Power Company, Montana-Dakota Utilities Company, Otter Tail Power Company, Northwestern Public Service Company, and Iowa Public Service Company," 298 N.W.2d 799, and counsel for the parties having appeared before the Court on the 19th day of February, 1981, and presented their arguments, and the Court having considered the arguments of counsel, together with the briefs submitted by the parties, and having on this date issued its written decision, now, therefore, in accordance with that decision, it is

ORDERED that the alternative writ of prohibition issued by the Court on February 3, 1981, be and it is hereby quashed, effective May 1, 1981, and the proceeding is hereby dismissed.

IT IS FURTHER ORDERED that the Court's order of February 13, 1981, staying implementation of said legislation, namely, Senate Bill 40, be and it is hereby vacated effective May 1, 1981.

DATED at Pierre, South Dakota, this 15th day of April, 1981.

BY THE COURT:

/s/ Roger L. Wollman
Chief Justice

ATTEST:

/s/ Gloria J. Engel
Clerk of the Supreme Court
(SEAL)

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, ex rel. LARRY VAN EMMERIK and all others similarly situated, Petitioner, vs. WILLIAM J. JANKLOW, Governor of South Dakota; MARK V. MEIERHENRY, Attorney General of South Dakota; DAVID VOLK, Treasurer of South Dakota; and R. VAN JOHNSON, Secretary of Revenue of South Dakota, Respondents, and BLACK HILLS POWER AND LIGHT COMPANY; NORTHERN STATES POWER COMPANY; MONTANA-DAKOTA UTILITIES COMPANY; OTTER TAIL POWER COMPANY; NORTHWESTERN PUBLIC SERVICE COMPANY; and IOWA PUBLIC SERVICE COMPANY, Parties Respondent added by Supreme Court.	ORDER DENYING REHEARING #13354

A petition for rehearing in the above cause having been filed April 28, 1981, and no issue or question of law or fact appearing to have been overlooked or misapprehended, and more than fifteen days having elapsed therefrom and no written statement having been filed with the Clerk of this Court by a majority of the justices thereof requesting a rehearing, now, therefore, in accordance with the Rehearing Procedure Rule of this Court, the petition for rehearing is denied.

DATED at Pierre, South Dakota, this 19th day of May, 1981.

BY THE COURT:

/s/ Roger L. Wollman
Chief Justice

ATTEST:

/s/ Gloria J. Engel
Clerk of the Supreme Court
(SEAL)

IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

STATE OF SOUTH DAKOTA, ex rel. LARRY VAN EMMERIK and all others similarly situated, Appellant, vs. WILLIAM J. JANKLOW, Governor of South Dakota; MARK V. MEIERHENRY, Attorney General of South Dakota; DAVID VOLK, Treasurer of South Dakota; and R. VAN JOHNSON, Secretary of Revenue of South Dakota, Appellees, and BLACK HILLS POWER AND LIGHT COMPANY; NORTHERN STATES POWER COMPANY; MONTANA-DAKOTA UTILITIES COMPANY; OTTER TAIL POWER COMPANY; NORTHWESTERN PUBLIC SERVICE COMPANY; and IOWA PUBLIC SERVICE COMPANY, Appellees.	#13354 NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

TO: APPELLEES ABOVE NAMED AND THEIR COUNSEL OF RECORD:

Notice is hereby given that Larry Van Emmerik, the Appellant above named, for himself and all others similarly situated, hereby appeals to the Supreme Court of the United States from the final judgment of the Supreme Court of the State of South Dakota dissolving the preliminary writ of prohibition and denying a permanent writ of prohibition, entered in this action on April 15, 1981. This appeal is taken pursuant to 28 U.S.C. Section 1257(2).

Dated this 9th day of June, 1981.

/s/ Geo. A. Bangs
GEORGE A. BANGS
BANGS, McCULLEN, BUTLER, FOYE & SIMMONS
818 St. Joe Street; P.O. Box 2670
Rapid City, South Dakota 57709

GALE E. FISHER
208 Court House Plaza
Sioux Falls, South Dakota 57102
Attorneys for Appellant

CERTIFICATE OF SERVICE

The undersigned hereby certifies that he served the original and five copies of the foregoing Notice of Appeal to the Supreme Court of the United States upon the Clerk herein next designated, and one copy thereof upon the attorneys herein next designated, all on the date below shown, by depositing copies thereof in the United States mail, postage prepaid, at Rapid City, South Dakota, in envelopes addressed to:

Mrs. Gloria J. Engel
Clerk of the Supreme Court
State Capitol Building
Pierre, S.D. 57501

Mr. Mark V. Meierhenry
Attorney General
State Capitol
Pierre, S.D. 57501

Mr. David E. Morrill
Morrill, Hansen, Hubbard & Brown
625 9th Street
Rapid City, S.D. 57701

Mr. Brent A. Wilbur
May, Adam, Gerdes & Thompson
P.O. Box 160
Pierre, S.D. 57501

Mr. Leo A. Flynn
Attorney at Law
Madison, S.D. 57042

Mr. J. W. Grieves
Nordahl & Grieves
Suite 122, 13422 Clayton Road
St. Louis, MO 63131

Mr. Ellsworth F. Wilkinson
Wilkinson & Steele
103 Exond Street, S.E.
De Smet, S.D. 57231

Mr. Alan F. Glover
Attorney at Law
418 Fourth Street
Brookings, S.D. 57006

Mr. Robert B. Frieberg
Frieberg, Frieberg & Peterson
115 North Third Street
Beresford, S.D. 57004

which are the last addresses of the addressees known to the subscriber.

Dated this 9th day of June, 1981.

/s/ Geo. A. Bangs
GEORGE A. BANGS

81-293

NO. 81-283

Office - Supreme Court, U.S.
FILED
NOV 12 1981
ALEXANDER L. STEVAS,
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LARRY VAN EMMERIK, and all others similarly situated,

Appellant,

v.

WILLIAM J. JANKLOW, Governor of South Dakota; MARK V. MEIERHENRY, Attorney General of South Dakota; DAVID VOLK, Treasurer of South Dakota; and R. VAN JOHNSON, Secretary of Revenue of South Dakota,

Appellees,

and

BLACK HILLS POWER AND LIGHT COMPANY; NORTHERN STATES POWER COMPANY; MONTANA-DAKOTA UTILITIES COMPANY; OTTER TAIL POWER COMPANY; NORTHWESTERN PUBLIC SERVICE COMPANY; and IOWA PUBLIC SERVICE COMPANY,

Appellees.

On Appeal from the Supreme Court of South Dakota

APPELLEES' MOTION TO DISMISS OR AFFIRM

MARK V. MEIERHENRY
ATTORNEY GENERAL
State Capitol
Pierre, South Dakota 57501-5090
Telephone: (605) 773-3215

Counsel for Appellees

TABLE OF CONTENTS

	PAGE
TABLE OF AUTHORITIES	ii
STATEMENT	1
ARGUMENT	14
CONCLUSION	19
STATEMENT OF CONCURRENCE	20
CERTIFICATE OF SERVICE	22

TABLE OF AUTHORITIES

CASES	PAGE
Graham and Foster v. Goodcell, 282 U.S. 409, 51 S.Ct. 186, 75 L.Ed. 415 (1931)	18
In The Matter of the Appeal of the Sales Tax Refund Applications of Black Hills Power and Light Co., 298 N.W.2d 799 (S.D. 1980)	5
State ex rel. Van Emmerik v. Janklow, 304 N.W.2d 700, 705, 706 n. 4 (S.D. 1981)	2, 15, 17
United States v. Henszen and Company, 206 U.S. at 386-87, 27 S.Ct. at 747, 51 L.Ed. at 1104	17, 18
Van Emmerik v. State, 298 N.W.2d 804, 807 (S.D. 1980)	6, 11, 12, 13
Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938)	19
STATUTES	
SDCL 10-45-6	PASSIM
SDCL 10-45-8	8, 9
SDCL 10-45-53	5, 11

NO. 81-283

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1981

LARRY VAN EMMERIK, and all others similarly situated,

Appellant,

v.

WILLIAM J. JANKLOW, Governor of South Dakota; MARK V. MEIERHENRY, Attorney General of South Dakota; DAVID VOLK, Treasurer of South Dakota; and R. VAN JOHNSON, Secretary of Revenue of South Dakota,

Appellees,

and

BLACK HILLS POWER AND LIGHT COMPANY; NORTHERN STATES POWER COMPANY; MONTANA-DAKOTA UTILITIES COMPANY; OTTER TAIL POWER COMPANY; NORTHWESTERN PUBLIC SERVICE COMPANY; and IOWA PUBLIC SERVICE COMPANY,

Appellees.

On Appeal from the Supreme Court of South Dakota

APPELLEES' MOTION TO DISMISS OR AFFIRM

Pursuant to Rule 16, paragraphs 1(b) and 1(d) of the Revised Rules of this Court,

Appellees move that this appeal be dismissed or, alternatively, that the Judgment of the Supreme Court of South Dakota be affirmed.

STATEMENT

This is an appeal from an Order of the South Dakota Supreme Court quashing its own previously issued Alternative Writ of Prohibition and dismissing Appellant's petition for permanent Writ of Prohibition and Mandamus (State ex rel. Van Emmerik v. Janklow, 304 N.W.2d 700 (S.D. 1981)). The facts underlying the appeal are as follows:

The State of South Dakota since 1935 has imposed an occupational sales tax measured by the gross receipts of retailers. While the tax may be passed on to retail customers, there is no statutory requirement in South Dakota law that the retailer pass it on.

Collection remedies are provided against retailers who fail to pay the tax measured by gross receipts which includes all money or moneys

worth received in consideration of sales at retail. Deductions are not allowed for costs or any expenses; however, taxes paid on gross receipts by accounts found to be worthless and actually charged off for federal income tax purposes may be credited, provided that if such accounts are later collected the tax shall be paid on the amounts so collected. In other words, the tax is a retailer tax as opposed to a consumer sales tax.

A tax increase of one percent was levied in 1969 against utility companies as retailers of gas, electricity and water. While it is presumed the increase was passed on to consumers, it is a fact that the increase was remitted by the utility companies themselves, both investor owned, rural electric and municipal distributors.

This case had its origins in litigation commenced by Appellant in 1979. Appellant originally instituted a class action seeking a one percent refund of sales taxes from the State of South Dakota and from all retailers engaged in

the sale, furnishing or service of gas, electricity or water since January 1, 1976, which Appellant claimed were collected in excess of the rate imposed by SDCL 10-45-6. The utility companies eventually moved to dismiss because they had commenced an administrative action in June of 1979, seeking a similar one percent sales tax refund. Thereafter, Appellant moved to consolidate his action with the appeal taken to circuit court by the investor-owned utilities in the related administrative action following the denial of their applications for sales tax refunds by the Secretary of Revenue. On February 20, 1980, the Trial Court rendered judgment denying the relief sought in the investor-owned utilities case. Subsequently, on April 1, 1980, the Trial Court entered an order dismissing Appellant's complaint based upon its determination in the related case that the State had not collected a sales tax in excess of that imposed by statute.

Appellant and the investor-owned utilities then took separate appeals to the South Dakota Supreme Court. In the appeal of the investor-owned utilities, that Court concluded that the sales tax rate imposed by SDCL 10-45-6 was three percent and that the State had, since 1969, collected a sales tax in excess of the amount imposed by statute. It accordingly reversed and remanded for determination of a credit or refund to be adjusted in favor of the utilities pursuant to the provisions of SDCL 10-45-53. (See: In The Matter of the Appeal of the Sales Tax Refund Applications of Black Hills Power and Light Co., 298 N.W.2d 799 (S.D. 1980)). Appellant's appeal was decided the same day. In that case, the South Dakota Supreme Court held that, due to the doctrine of sovereign immunity, Appellant had no standing to seek a refund from the State either as a representative of his class or in his individual capacity. At the same time, it determined that Appellant was entitled to proceed

against the utilities to seek relief derivative of any remedy adjusted in favor of the utilities in the related litigation. (See: Van Emmerik v. State, 298 N.W.2d 804 (S.D. 1980)).

Following remand, and during the pendency of circuit court hearings in the two cases, the 1981 South Dakota Legislature enacted Senate Bill 40, entitled "An Act to provide for a retroactive and prospective sales tax increase on utility services, amusements and athletic events; to allow credit for taxes already paid, to validate and ratify the collection of prior taxes, and to declare an emergency."

This enactment, SB 40, now found as a Commission Note to South Dakota Codified Laws 10-45-6, passed in 1981 by a unanimous Senate (34-0) and House of Representatives (65-0) of the State of South Dakota and signed into law on January 30, 1981, as an emergency measure thereby making it effective on that date, provided for both a retroactive and prospective sales tax

increase on utility services, amusements and athletic events. The bill also allowed credit for taxes already paid by retailers to the State and it further validated and ratified the collection of prior taxes. The text of this law is found in the Jurisdictional Statement of Appellant (pages 2-7) and will not be repeated in this Motion. A brief resume of that Act, however, is considered appropriate with respect to the Appellee's Motion to Affirm Or, in the Alternative to Dismiss.

Section 1 of that Act sets forth in some detail the Legislative Declaration concerning the serious emergency within the state resulting from the decisions of the South Dakota Supreme Court with respect to the rate of sales tax on utility services and amusement events, including the impairment of the fiscal integrity of the State as well as relating the denial of basic services of government in the event of refund or the requirement to pay additional taxes to replace revenues lost to the state treasury.

Sections 2 and Section 3 amend the basic rate with respect to utilities. South Dakota Codified Laws 10-45-6. Section 2 raises the rate from three percent to five percent and Section 3 raises the three percent rate to four percent. It will be noted later how these sections are time phased into the retroactive and prospective changes.

Section 4 raises the three percent rate with respect to athletic and amusement events provided by SDCL 10-45-8 to four percent.

Section 5 operates with respect to the retroactive characteristics of Section 2 and makes the tax effective from July 1, 1969 through May 1, 1980 (at this point in time a special one percent railroad acquisition tax went into effect), and again effective after the railroad tax increase was removed by operation of law or by certification of the Secretary of Revenue.

Section 6 made the five percent utility tax of Section 3 effective commencing with the

imposition of the railroad tax until such time as the railroad tax was removed.

Section 7 made the amusement and athletic event tax retroactive at four percent from July 1, 1969.

Section 8 of the law, significantly important from a standpoint of the validity of a retroactive tax, protected retailers who, because of the uncertainty in various tax rates, may not have collected the full amount of tax at the time it was remitted to the State. That section provides that these retroactive taxes are only effective to the extent that the taxes were theretofore collected by the retailer. In order to provide full credit, that section also provides that any tax which the retailer had theretofore paid under the utility tax law, SDCL 10-45-6, or the athletic and amusement tax law, SDCL 10-45-8, shall be credited to the tax imposed by Sections 2, 3 and 4 of the Act. Thus, whatever tax was paid within the appropriate rate structure is the

tax that was at the time of adoption of this law then owing; there is no further tax liability under it by any retail taxpayer and consequently no tax for that retail taxpayer to pass on to any customer.

Section 9, another important section with respect to validity of a retroactive tax, is the ratification section which validates the prior collection of taxes which was effectuated before the passage of the act.

Sections 10 and 11 contain procedural clauses with respect to enactments in South Dakota, the first being a severability clause expressing legislative intent in the application of its provisions and the second being an emergency clause making the bill fully effective on the date it was signed by the Governor.

In the earlier tax refund proceeding brought by the utility companies through an administrative proceeding and hearing in Circuit Court, the South Dakota Supreme Court, after

reversing the trial court in that Court's finding that the Legislature had in fact increased the tax to utility companies by one percent since 1969, remanded the matter for a determination of a credit or refund for such utility companies pursuant to the provisions of South Dakota law, SDCL 10-45-53. That section provides where it appears that an amount of tax was paid which was not due, whether as the result of a mistake of fact or an error of law, the amount overpaid should be credited against any tax due or to become due from the person who made the erroneous payment or refunded to such person if the claim for refund was filed with the Secretary of Revenue within three years after such erroneous payment was made.

In the old Van Emmerik case, Van Emmerik v. State, 298 N.W.2d 804 (S.D. 1980) the South Dakota Supreme Court held at 806:

> Refunds may be claimed only by "the person who made the erroneous payment.'" The retail sales tax in this case is the liability of the retail utility

> companies and not the ultimate consumer. In Northwestern National Bank of South Dakota v. Gilles, 82 S.D. 457, 461, 148 N.W.2d 293, 295 (1967) we stated: S.D.C. 57.3201 clearly imposes the sales tax on the retailer. The court so determined in State ex rel. Sioux Falls Motor Co. v. Welsh, 65 S.D. 68, 270 N.W. 852, when it wrote:
>
> The fact must be kept in mind that the tax with which we are dealing is an excise or privilege tax imposed upon the privilege of engaging in an occupation. It is not a tax upon gross receipts as such, but gross receipts ***is used as a measure to determine the amount of tax to be paid for the privilege of engaging in an occupation or business.

The court thus held that the tax was clearly imposed upon utility retailers (Id. at 807) and that the only person who could make an erroneous payment and hence seek a refund or credit from the state was the utility company. The State did not waive its sovereign immunity beyond the three year period and the action could not be maintained against the State. The Court concluded "Appellant (Van Emmerik) lacks standing to seek a sales tax refund on his own behalf. That want of standing also applies to the appellant class."

The final determination by the South Dakota Supreme Court in Van Emmerik I was that the only remedy available for the ultimate consumer, if any remedy was available, was a remedy which is "derivative of such credit or refund" of the utility. The Court at 807 stated:

> What we have concluded concerning sovereign immunity does not apply to the action against the investor-owned utilities, which seeks a one percent refund from the utilities for all South Dakota residents who, over a three-year period, have paid a four percent sales tax on certain utility charges. Due to our decision in the related appeal that, upon remand, the utility retailers are entitled to a credit or refund subject to the three-year limitation imposed by SDCL 10-45-53, it follows that any relief in the present case must come from the utilities, since any remedy available here is derivative of such credit or refund. The manner in which the consumer class and the utility companies are described in the pleadings in this case indicates that the relief appellant seeks does not exceed the credit or refund that will be adjusted to the utilities in the related litigation.
>
> The order of the circuit court is affirmed to the extent it dismissed appellant's action aginst the State, but is reversed insofar as it dismissed appellant's action against the utility companies. The case is remanded accordingly.

ARGUMENT

The appeal here should be dismissed or in the alternative the order quashing the alternative writ of mandamus of the South Dakota Supreme Court should be affirmed on the following basis:

1. There is an insubstantial federal question involved and no one, whether it be the utility companies themselves or the customers of the utility companies, has the slightest possibility of receiving any monetary benefit.

2. As an additional basis for dismissal or affirmance under Rule 16.1(d) this entire proceeding seeks only to benefit the attorneys for the Appellant through the establishment of a fund for their legal fees which they have already set at $280,000 and which attempt has been rejected by a state circuit court.

In support of such argument the Appellees submit the following:

Appellant has stated three objectionable results to the retroactive enactment of the South Dakota Legislature. (Appellant's brief page 11.) These are:

(a) To nullify the final judgment of the South Dakota Supreme Court in judging a tax refund to be due and to abrogate all rights of the plaintiff class to the proceeds of that judgment;

(b) To wipe out all claims of the plaintiff class against all of the utility companies in South Dakota which are asserted in Van Emmerik II; and

(c) To bar all claims for refund against the State of South Dakota by other utility companies.

Appellant seems to proceed from the conclusion that somehow there is a class of people headed by Van Emmerik which is entitled to some sort of nameless refund. The Supreme Court, however, in the case here appealed from noted (Van Emmerik, 304 N.W.2d at 706 n. 4):

> Petitioner (Appellant) conceded in oral argument that no final, enforceable judgment in his favor exists.

The Court also noted that the Petitioner (Appellant) does not assert that there is a final, unreviewable determination even concerning his rights following from the seminal litigation, that is the case of Van Emmerik I, or the Sales Tax Refund Case.

The action of the South Dakota Legislature in levying a retroactive tax in lieu of payment of refund claims succeeded in avoiding a revolving monstrosity. Had the legislature appropriated money and levied a tax to meet that appropriation, the new tax would have been against the same people who theoretically would be the recipients of the refund claims. In order then for the State to make a refund to perhaps two hundred thousand householders, it would first have to levy a tax of fifty million dollars on those same householders. The cost of collecting the tax and paying attorney's fees is conservatively estimated at five million dollars.

It should likewise be noted that the people who Appellant urges would be the beneficiaries were also the beneficiaries of the tax impositions and expenditures since 1969, all of which went into the State General Fund and were appropriated by the elected representatives of the people for state and local purposes.

As to wiping out the claims of the plaintiff class, against the utility companies, (Appellant Argument (b)), the South Dakota Supreme Court disagreed with this contention stating in Van Emmerik II, supra at 705:

> Petitioner (Appellant) claims that SB 40 has thus impermissibly stripped him of an absolute vested right to recover for the sales tax overcharges that the Act attempts to ratify.
>
> We disagree.

3. Even if it is assumed that the Petitioner's right to recover was in some sense vested, that right is nevertheless subject to the equities existing against it. United States v. Henszen and Company, 206 U.S. at 386-87, 27

S.Ct. at 747, 51 L.Ed. at 1104. It is apparent here that Petitioner's asserted right is not based on any substantial equity. The unauthorized tax had been mistakenly collected without interruption since 1969 and Petitioner presumably shared in whatever public benefits the tax funded. Where an asserted vested right that is not linked to any substantial equity arises from the mistake of officers purporting to administer the law in the name of the state, the legislature is not prevented from curing the defect in administration simply because the effect may be to destroy claims that would otherwise exist. Graham and Foster v. Goodcell, 282 U.S. 409, 51 S.Ct. 186, 75 L.Ed. 415 (1931).

Appellant also alleges that this action would have the effect of barring all claims for refund against the State of South Dakota by other utility companies (Appellant Argument (c)). In response, the Appellees contend that this retroactive legislation is a curative act, ratifing the

past imposition of a specific tax rate, and correcting a technical defect in the statute. This legislation was adopted in such a manner as not to be so harsh and oppressive as to transgress the United States Constitution. In addition, the intention of the legislature to pass a retroactive tax is clearly expressed. Welch v. Henry, 305 U.S. 134, 59 S.Ct. 121, 83 L.Ed. 87 (1938).

Therefore while the claim for refund by other utility companies is effectively nullified, the passage of a retroactive tax eliminates the need for those same utility companies to collect the refund and pass it on to the Appellants in this action. That utility companies do not benefit from Appellant's claims is made evident by the fact that utility companies are Appellees rather than Appellants in this action.

CONCLUSION

Therefore, it is Appellees' contention that, in view of the following facts, Appellant has

not stated a substantial federal question: (1) the class of taxpayers who will receive any declared refunds are the same taxpayers who will be taxed to pay the refund, (2) the class of taxpayers who will receive the declared refunds benefitted from the public benefits which the original tax funded, and (3) the $50,000,000 refund is approximately one third of the State's tax revenues in the present fiscal year.

STATEMENT OF CONCURRENCE

I am authorized to state that Vincent J. Protsch, Attorney for the South Dakota Rural Electrical Association and Robert B. Frieberg, Attorney for the South Dakota Municipal Electrical Association, parties Amicus Curae in the proceeding in the South Dakota Supreme Court from which this appeal is being taken, on behalf of such Associations, join Appellees William J. Janklow, Mark V. Meierhenry, David Volk, and R. Van Johnson in this Motion to Dismiss or in

the alternative to affirm the Judgment of the South Dakota Supreme Court.

Respectfully submitted,

MARK V. MEIERHENRY
ATTORNEY GENERAL

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that three true and correct copies of the Appellees' Motion to Dismiss or Affirm in the matter of Larry Van Emmerik v. Janklow, et al. were served by United States mail, first class, postage prepaid upon Mr. Robert B. Frieberg, Beresford, South Dakota 57004; Mr. Alan F. Glover, Box 686, Brookings, South Dakota 57006, Mr. Brent Wilbur, May, Adam, Gerdes & Thompson, 503 South Pierre Street, Pierre, South Dakota 57501; Mr. Gale E. Fisher, Attorney at Law, 208 Court House Plaza, Sioux Falls, South Dakota 57101; Mr. George A. Bangs, Bangs, McCullen, Butler, Foye & Simmons, 818 St. Joe Street, Rapid City, South Dakota 57701; Mr. Jack Grieves, Winner, South Dakota 57580; Mr. David Morrill, Box 8108, Rapid City, South Dakota 57709; Mr. Robert Haeder, Box 1414, Huron, South Dakota 57350; Mr. Leo P. Flynn, Box 505, Milbank, South Dakota 57252; Mr. Ellsworth F. Wilkinson, 103 2nd Street, S.E,

DeSmet, South Dakota 57231; and Mr. Vincent J. Protsch, Attorney at Law, Howard, South Dakota 57349 on this 10th day of November, 1981.

MARK V. MEIERHENRY
ATTORNEY GENERAL